Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

SHARI BAIR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF C. W. BAIR, PETER VOSKAMP, and JERRY AMUSSEN,

Petitioners,

v.

WILLIAM FRED HAGANS, SEWELL & RIGGS, BARRY ABRAMS, WILLIAM MATTHEWS, CLYDE WILSON and HAGANS & SYDOW,

Respondents.

On Petition for Writ of Certiorari to the Fourteenth Court of Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the appellate court's action, in the striking of a litigant's points of error on appeal, essentially appellate death penalty sanctions which, therefore, must meet the test of *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct.1087 (1958)? If so, is the court's failure to properly apply the *Societe* test a violation of a litigant's right to due process?

2. Can a litigant be subject to death penalty sanctions when (his) violation was caused, in whole or in part, by the breach of duty of a public official, in this case, the District Clerk? Does the same constitute a denial of (his) Fifth and Fourteenth Amendment rights to due process of law?

3. Is Texas Rule of Appellate Procedure 74(f), so vague as to result in the violation of a litigant's rights to due process and equal protection under the law?

4. Does the Seventh Amendment guarantee a litigant the right to trial by jury so as to preclude summary judgment where a genuine issue of material fact continues to exist?

5. Where a summary judgment is reviewed on appeal "de novo," does the appellate court's failure to review the record in the light most favorable to the non-movant, constitute a violation of a litigant's right to trial by jury?

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings are as follows:

1. PETITIONERS

Shari Bair, Individually and as Representative of the Estate of C. W. Bair, Peter Voskamp, Jerry Amussen

Attorney for Petitioners

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2. RESPONDENTS

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In The

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October Term, 1998

SHARI BAIR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF C. W. BAIR, PETER VOSKAMP, and JERRY AMUSSEN,

Petitioners

v.

WILLIAM FRED HAGANS, SEWELL & RIGGS, BARRY ABRAMS, WILLIAM MATTHEWS, CLYDE WILSON and HAGANS & SYDOW,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS OF TEXAS

The Petitioners, SHARI BAIR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF C. W. BAIR, PETER VOSKAMP, and JERRY AMUSSEN, respectfully pray that a Writ of Certiorari issue to review the opinion of the Fourteenth Court of Appeals of Texas, rendered and filed in the above-entitled proceeding on May 29, 1997, and the subsequent denial of the Petition for Review by the Supreme Court of Texas.

OPINIONS BELOW

The Supreme Court of Texas denied the Petitioners' Petition for Review as is represented in Appendix B hereto. The memorandum decision of the Fourteenth Court of Appeals (Justices Anderson, O'Neill and Cannon sitting) was authored by Justice Cannon and is

unpublished.[1] It is printed in Appendix A hereto.

JURISDICTION

The Petitioners initially brought suit in the 157th District Court located in Houston, Harris County, Texas. The Fourteenth Court of Appeals Opinion was rendered and filed on May 29, 1997 (Appendix A). The Supreme Court of Texas denied Petitioners' Petition for Review on April 9, 1998. (Appendix B). The Supreme Court of Texas denied Petitioners' Motion for Rehearing of Petition for Review on July 30, 1998. (Appendix C). This Court's jurisdiction is invoked under Title 28, U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT

UNITED STATES CONSTITUTION

U.S. CONST. amend. V.
No person shall ... be deprived of life, liberty, or property, without due process of law; ...

U.S. CONST. amend. VII.
In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. XIV.
...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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1 The Honorable Bill Cannon was sitting by special assignment.

UNITED STATES STATUTES

Title 28, U.S.C. §1257
State courts; certiorari
(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

...

TEXAS STATUTES

TEX. GOV'T. CODE ANN. §51.303 (Vernon 1988)

...

(a) District Clerks Duties & Powers
The clerk of a district court has custody of and shall carefully maintain and arrange the records relating to or lawfully deposited in the clerk's office.

TEXAS RULES OF COURT

TEX. R. CIV. P. 166a
SUMMARY JUDGMENT
(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.
(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment

in his favor as to all or any part thereof.

(c) ... The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, ... on file at the time of the hearing, ... show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion...

...

TEX. R. CIV. P. 324

PREREQUISITES OF APPEAL

(a) Motion for New trial Not Required. A point in a motion for new trial is not a prerequisite to a complaint on appeal in either a jury or a non-jury case, except as provided in subdivision (b).

(b) Motion for New Trial Required. A point in a motion for new trial is a prerequisite to the following complaints on appeal:

(1) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;

(2) A complaint of factual insufficiency of the evidence to support a jury finding;

(3) A complaint that a jury finding is against the overwhelming weight of the evidence.

(4) A complaint of inadequacy or excessiveness of the damages found by the jury; or

(5) Incurable jury argument if not otherwise ruled on by the trial court.

...

TEX. R. APP. P. 51(c)

THE TRANSCRIPT ON APPEAL

(c) Duty of Clerk. Upon perfection of the appeal, the clerk of the trial court shall prepare under his hand and seal of the court and immediately transmit the transcript to the appellate court designated by the appellant. The pages of the transcript shall be numbered consecutively and there shall be an index prepared by the clerk showing the location of each document in the transcript. The transcript shall be prepared in the form directed by the

Supreme Court and the Court of Criminal Appeals which will make an order or orders in such respect for the guidance of trial clerks. ...

...

TEX. R. APP. P. 52

PRESERVATION OF APPELLATE COMPLAINTS

(a) General Rule. In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. If the trial judge refuses to rule, an objection to the court's refusal to rule is sufficient to preserve the complaint. It is not necessary to formally except to rulings or orders of the trial court.

...

(d) Necessity for Motion for New Trial in Civil Cases. A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in Rule 324(b) of the Texas Rules of Civil Procedure.

TEX. R. APP. P. 83

NO AFFIRMANCE, REVERSAL OR DISMISSAL FOR WANT OF FORM OR SUBSTANCE

A judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities provided the court may make no enlargement of the time for filing the transcript and statement of facts except pursuant to paragraph (c) of Rule 54 and except that in criminal cases late filing of the transcript or statement of facts may be permitted on a showing that otherwise the appellant may be deprived of effective assistance of counsel.

STATEMENT OF THE CASE

This case originally arose from Petitioners' appeal from a summary judgment granted by the 157th State Judicial District Court of Houston, Harris County, Texas. Petitioners Shari Bair, individually and as representative of the estate of C.W. Bair, Peter Voskamp and Jerry

Amussen (collectively "Petitioners"), brought suit against three attorneys (Fred Hagans, Barry Abrams, and William Matthews), two law firms (Sewell & Riggs and Hagans & Sydow), and a private investigator (Clyde Wilson) alleging a series of torts in connection with the Respondents' alleged fabrication of evidence and subornation of perjury in connection with the filing of a frivolous bill of review action which, Petitioners contend, was designed for other motives, but ultimately resulted in their loss of the major portion of a judgment worth in excess of $5,000,000.

The Defendant Respondents fall into three groups: Hagans and Hagans & Sydow (hereafter "Hagans"), Abrams, Matthews, and Sewell & Riggs (hereafter "Sewell & Riggs"), and Clyde Wilson (hereafter "Wilson"). Although this case was filed in late 1988, it was dismissed in 1991 for a single act of discovery abuse. That dismissal was reversed, based on *Transamerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913 (Tex. 1991), and the case was remanded to the trial court in August of 1992. Not long after the case was remanded, all of the Respondents filed motions for summary judgment and, in 1994, the trial court granted those motions. A record was requested and, ultimately the Petitioners' brief was filed. In their four points of error filed with the Court of Appeals, Petitioners claimed that (1) the trial court erred in granting the summary judgment motions, and (2) that the granting of the summary judgment motions (using a standard inconsistent with the accepted rule of the common law) essentially denied them their right to trial by jury. This was the first time Respondents raised the issue of whether the trial court's action in granting summary judgment, despite the continued existence of genuine issues of material fact, deprived the Petitioners of their right to trial by jury as guaranteed by the 7th Amendment to the Constitution of the United States.

Throughout the period that this case was on appeal to the Fourteenth Court of Appeals, the compilation of the appellate record was nothing short of a nightmare. Petitioners filed their notice of appeal and properly requested that the record be prepared and filed with the appellate court for review; however, in the ensuing three years, that would be the only smooth part to this appeal.

At the time that Petitioners' initial brief became due, Petitioners'

counsel was in trial (coincidently against a defendant who was also a principal player in the facts underlying this case) that ultimately ended in a mistrial after fifteen weeks. During this time, counsel made and the Court granted her reasonable extension requests; however, upon preparation of Petitioners' brief counsel discovered that the District Clerk had failed to include a large part of the requested materials in the official transcript. Although admittedly containing only limited transcript references, counsel timely filed Petitioners' brief citing to extensive case authority and statements supporting her request for reversal. When the Respondents raised arguments regarding her (Petitioners' counsel)'s inadequate "briefing," counsel became acutely aware of the appellate record deficiency and began her attempt to secure a duplicate record and have the Clerk file the same with the appellate court. She also asked to amend her brief with more record cites. There was never a contention that Petitioners had not timely requested what would have been a sufficient record on appeal; instead, apparently the district clerk simply "misplaced" the majority of the court's file, making it impossible to fully comply with Petitioners' requests for a full record.

Soon counsel became consumed with the task of supplying enormous volumes of her file copies of documents to the trial court for certification of the same as duplicate originals[2] in order to have them transferred to the appellate court for construction of the record. This process caused additional delays and drew disfavor of the court, the latter being fed by the Respondents' refusal to stipulate to the necessary supplementations and the resulting extensions required. This was particularly unfair, in light of the fact that the duty to maintain the Court's file is vested with the clerk of the court by statute. (See TEX. GOV'T. CODE ANN. §51.303(a) (Vernon 1988)) It was through no fault of Petitioners' counsel that the file was not properly maintained and, therefore, not available to properly cite to on appeal. Petitioners filed the last supplemental transcript with the Court of Appeals

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2 Even this ministerial process was a nightmare, since substitution of documents required the agreement and stipulation of all parties and, as here, when agreement could not be reached, an administrative judge had to hear the matter because the judge who was familiar with the record had since been appointed as the Chief Justice on the Court of Appeals.

in late August of 1996.

Petitioners' counsel was again put to trial (in the aforementioned mistrial case) in October of 1996 and was still in trial when the instant appeal was set for oral argument. In response to the Court's questions regarding her insufficient briefing, counsel asked if the Court would extend her the opportunity to rebrief; however, the Court was not inclined to allow the same. Although in other circumstances, counsel may otherwise have simply amended the brief and then asked for leave to file, in light of the Court's earlier directive (on a prior occasion) that no amendments to the brief would be allowed, she did not do so. Although she later got the right to amend one time in June, that was still at a time before the district clerk had completed his preparation of the supplemental transcript. As a result of these facts, she did not risk drawing wrath upon her client via an uninvited and unwelcome "Second Amended Brief." Six months after argument, the Court affirmed the trial court's granting of summary judgment, finding that the Petitioners had waived their points of error, due to insufficient briefing. With their Motion for Rehearing, Petitioners requested leave to file (and did tender) an amended brief which referenced 194 cites to the finally reconstructed appellate court transcript. Subsequently, that motion was denied and the amended brief was rejected.

The Court of Appeals ultimately affirmed the trial court's judgment primarily based upon its finding that Petitioners had waived the great majority of their arguments through poor briefing and an inadequate number of record cites. The court also found that the Petitioners had waived their Seventh Amendment challenge because they had not first presented the issue to the trial court for consideration. This holding was made despite the fact that they, the Petitioners, did not and could not have known the Court would act outside the common law standard before the summary judgment was decided. The opinion of the Fourteenth Court of Appeals was designated "not for publication" under TEX. R. APP. P. 90.

As mentioned earlier, in response to the appellate court's opinion, Petitioners immediately filed a Motion for Rehearing raising, for the first time, the denial of due process and equal protection arguments resulting from what they now characterize as "death penalty" sanctions at the

appellate court level. They also filed a Motion for Leave to File their Second Amended Brief. After Petitioners' motion for rehearing was denied, a Petition for Review was subsequently filed in the Texas Supreme Court. The Supreme Court denied the Petition for Review and Rehearing of the same. (See Appendix B and C.)

Background - (The Original Case)

In 1982, Petitioners, Pete Voskamp, Shari Bair and Jerry Amussen, filed a stock fraud suit against Roman F. Arnoldy, John Arnoldy, and Triten Corporation (hereafter "the Voskamp case"). Respondent Hagans, along with his then partner, Houston attorney, John O'Quinn, represented Petitioners in the trial of the Voskamp case. Mr. O'Quinn is a highly controversial, nationally recognized trial lawyer and something of a "lightning rod" within the Texas Bar.[3] Respondents Matthews, Abrams, and Sewell & Riggs, represented the Arnoldy defendants. After a trial on the merits, the jury returned a verdict valued in excess of five million dollars ($5,000,000) in favor of Petitioners; however, almost immediately thereafter, the trial court entered a judgment notwithstanding the verdict. That take-nothing judgment was then appealed to the First Court of Appeals sitting in Houston, Texas.

At or near the time the Voskamp case was tried, Mr. O'Quinn was the subject of a highly publicized barratry investigation by the State Bar of Texas. As part of that investigation, the State Bar had retained another well-known Houston lawyer, Tom Alexander, to serve as special prosecutor over that case. Supposedly, after oral argument but before the Court of Appeals had issued its opinion, Sewell and Riggs "discovered" facts which led them to believe O'Quinn had tampered with the jury in the Voskamp

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3 See *The Best Paid Trial Lawyers,* FORBES, October 16, 1989, at 204; Max Boot, *Rule of Law: A Courtier Implicates the King of Torts,* Wall St. J., December 18, 1996, at A21; Mary Flood, *Open Season: Lawyers Slam Disciplinary Secrecy,* Wall St. J., October 21, 1998, at T1; Brigid McMenamin, *The Best Paid Lawyers,* FORBES, November 6, 1995, at 145; *O'Quinn Pleads Guilty to Practicing Law Without a License,* Wall St. J., December 18, 1997, at B12; and Christopher Palmeri, *A Texas Gunslinger (Attorney John M. O'Quinn),* FORBES, July 3, 1995, at 42.

case. Tom Alexander, acting outside the proper scope of his authority as a special prosecutor for the State Bar of Texas concerning the barratry investigation, had also "discovered" (if not concocted and/or flat out intentionally fabricated) false information to the effect that O'Quinn had tampered with the Voskamp jury. Alexander, who was later found to have improperly (without the Bar's consent), retained Respondent Clyde Wilson as an investigator in the original barratry investigation, sua sponte expanded both his and Wilson's role to include investigating the newly alleged jury tampering charges.

He (Alexander) and Wilson, then "reported" the false information, not only to the Harris County District Attorney's office, but also to the public at large through Wilson's disclosure to the media in blatant violation of the State Bar Rules requiring absolute confidentiality. In spite of these pressure tactics and ensuing media campaign of mis-information, no grievance was filed with the State Bar. Likewise, the State Bar of Texas did not, on its own motion, prosecute the claim based on the "information" filed by its own special prosecutor, Tom Alexander or by Alexander's own hand picked investigator, Clyde Wilson.

At some point, Sewell & Riggs sought to gain access to otherwise confidential and privileged information obtained by Wilson by virtue of his (Wilson's) relationship with Tom Alexander and Alexander's ensuing authority of the State Bar of Texas by also retaining Clyde Wilson to investigate the allegations of Mr. O'Quinn's jury tampering in the Voskamp case.

In the course of investigating the barratry charges for Alexander and the tampering charges for Sewell & Riggs, Wilson obtained two affidavits from Respondent Hagans, who, although by now had severed his partnership with O'Quinn, still served as one of the Petitioners' attorneys and as co-counsel on the Voskamp appeal. Wilson also contacted two other witnesses and obtained/extorted what were later proved to be largely false affidavits designed, on their face, to give the appearance of support to the jury tampering allegations. Although Sewell & Riggs went with Wilson and provided this information to the Harris County District Attorney's office, the District Attorney's office, again, chose not to pursue charges.

Sewell & Riggs did not, however, report this same information to either the District Court Judge or the jurists who were then considering the matter at the Court of Appeals, as was required by the State Bar of Texas' own rules of Professional Conduct.

Apparently, as long as their take-nothing judgment was upheld on appeal, Sewell & Riggs' sense of justice was not so inflamed as to demand disclosure. However, on November 27, 1987, all of that changed. It was on that date that the Court of Appeals issued its opinion in which it reversed the JNOV and entered judgment for the Petitioners on the jury verdict. Coincidentally, after the appellate court reversed the trial court's ruling and found that the trial court's action in entering the JNOV was erroneous, the Respondents felt the jury tampering evidence now became so "compelling" that it must be brought to the attention of the Court. This was many months after the original affidavits were obtained and/or otherwise had come into the possession of all Respondents. It was at this point that Sewell & Riggs filed a motion for rehearing in the Court of Appeals, based primarily upon the allegations of jury tampering. The First Court of Appeals overruled this motion, noting the delay in presentation, but did acknowledge that "the contentions advanced should properly be resolved by appropriate bill of review proceedings, where evidence may be presented and a thorough factual determination made." *Voskamp v. Arnoldy*, 749 S.W.2d 113, 127 (Tex.App.--Houston [1st Dist.] 1987, writ denied).

The Attempt to Abstract and the Bill of Review

Only four days after the November 12, 1987 Court of Appeals opinion in the Voskamp case, Petitioners moved in the trial court to enter judgment on the verdict. Upon a motion from Sewell & Riggs, the Court of Appeals issued an injunction enjoining Petitioners from interfering with its jurisdiction until issuance of its final mandate at the end of the appeal. Respondents also filed a bill of review seeking to avoid responsibility for the underlying judgment. On March 28, 1990, the trial court entered a take nothing judgment in the bill of review action, noting in a letter to the attorneys, "it appears that the Plaintiffs in the Bill of Review proceeding may have used the proceeding as leverage over the Defenders. That the Plaintiffs in the Bill of Review were found by a jury ... to have engaged in

fraud increases my concern about the motivations for the Bill of Review."

Unfortunately during the period the bill of review had been on file, many of the assets available to pay the original judgment were lost or squandered by the *Arnoldy* Defendants - Defendants who had been found to have committed fraud in the original underlying case.

The Action for Breach of Fiduciary Duty, Fraud and Conspiracy

After the bill of review action was concluded, Petitioners filed this action in district court (and a parallel suit against Alexander, et al in probate court) seeking to collect the damages they sustained as a result of their lawyer (Hagans') breach of duty and conspiracy with the other defendants who, they alleged, engaged in various illegal, wrongful conduct also to their detriment. After an unsuccessful attempt to have the case thrown out on sanctions, the Respondents moved for summary judgment in this case which the trial court granted despite the continued existence of genuine issues of material fact.

The Appeal

Petitioners then appealed that summary judgment to the Fourteenth Court of Appeals in Houston, Texas. The Court of Appeal dismissed the heart of Petitioners' case holding that the Petitioners "wholly failed to adequately present their contentions on appeal." This was in spite of the fact that the brief met all requirements of Rule 74 of the Texas Rules of Appellate Procedure[4] except that it had limited cites to the transcript on appeal. Otherwise, the brief contained the names and addresses of all parties and their counsel; it contained a Table of Contents and an Index of Authorities with page references; it contained a preliminary statement generally stating the nature of the cause of action; it contained points or error; it contained extensive argument and authority, and it contained a proper prayer for relief. The Court of Appeals' sole complaint was that the number of cites to the transcript (35) was insufficient under the circumstances.

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4 See Appendix D.

It is true, as stated by the Appellate Court in their opinion, that the record in this case consisted of an original transcript and three supplemental transcripts for a total of 16 volumes and 3,710 pages. It is also true that in the preliminary statement and procedural history section of their original brief, the Petitioners included few citations to the transcript then on file (although the record citation included in this section did refer the court to a key exhibit attached to Petitioners' pleadings in this case which was a letter from the trial judge expressing deep concern that the bill of review proceeding brought by Sewell & Riggs on behalf of their clients was done and used as "leverage" against the Petitioners.) (See quote *infra pp 11-12*) The opinion did not, however, mention that of those 3,710 pages of transcript, approximately 2,700 of those pages were obtained by Petitioners through motions to substitute lost documents and subsequent motions to supplement the appellate record, because it (the appellate record) had been lost by the District Clerk. Finally, it is true that the Amended Brief filed in June, 1996, contained only limited cites to the record, but it is also true that the bulk of the supplemental record and lost documents were not gathered, authenticated and made available for citation until August of that same year. Finally, this was not a brief that was filed by counsel or clients who were callously or consciously indifferent to the briefing requirements embodied in the Rules of Appellate Procedures. Although the various subsections of Petitioners' brief had limited references to the transcript, it made over a hundred cites to relevant cases and statutes.[5]

Upon oral argument, the Court of Appeals assigned the case to a visiting judge, who held that the Petitioners had waived points except for those complaining of the trial court's granting of summary judgment on their claims of malicious prosecution, by failing to adequately brief their claims. This opinion was particularly painful given that counsel for Petitioners was essentially forced to recreate the entire record before filing it on appeal. All of this effort and delay was a direct result of the District

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5 The Court of Appeals granted Petitioners reasonable extensions of time to file their brief and allowed one amendment to their brief; the amended brief was required to be done before the supplemental transcript was completed.

Clerk of Harris County, Texas' failure to maintain the Court's file as required by law! (See TEX. GOV'T. CODE ANN. 51.303 [Vernon 1998].)

REASONS FOR GRANTING THE WRIT (ARGUMENTS)

QUESTION 1

IS THE APPELLATE COURT'S ACTION, IN THE STRIKING OF A LITIGANT'S POINTS OF ERROR ON APPEAL, ESSENTIALLY APPELLATE DEATH PENALTY SANCTIONS WHICH, THEREFORE, MUST MEET THE TEST OF *SOCIETE INTERNATIONALE V. ROGERS*, 357 U.S. 197, 78 S.CT.1087 (1958)? IF SO, IS THE COURT'S FAILURE TO PROPERLY APPLY THE *SOCIETE* TEST A VIOLATION OF A LITIGANT'S RIGHT TO DUE PROCESS?

Whether an imposition of sanctions is "just" is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed. This means that "just" sanctions must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanction should be visited upon the offender. The court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both. This may not be an easy matter in many instances. On the one hand, a lawyer cannot shield his client from sanctions; a party must bear some responsibility for its counsel's actions when it is or should be aware of counsel's conduct and the violation of court rules and procedures. On the other hand, a party should not be punished for counsel's conduct in which he is not implicated apart from having entrusted to counsel its legal representation. The point is, the sanctions the trial court imposes must relate directly to the abuse found and be directed toward the abuser who perpetrated or assisted in the offense.

Second, "just" sanctions must not be excessive. The punishment should fit the crime. A sanction imposed should be no more severe than necessary to satisfy its legitimate purposes. Thus, it follows naturally that

courts must consider the availability of less stringent sanctions in order to determine whether such lesser sanctions would fully promote compliance.

These standards set the bounds of permissible sanctions within which courts must exercise sound discretion. The imposition of very severe sanctions is limited, not only by these standards, but by constitutional due process. The sanctions imposed against Shari Bair, Pete Voskamp and Jerry Amussen by the Fourteenth Court of Appeals are the most devastating an appellate court can assess against a party. When an appellate court strikes a party's brief, dismisses its appeal and, thereby, affirms a lower court's judgment simply for inadequacies in the briefing process, the court adjudicates the party's claim without regard to its merits, but based instead upon the parties' counsel's conduct on appeal. On appeal, just as with sanctions imposed by the trial court, "[t]here (must be) constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for consideration of the merits of his cause." See generally *Societe Internationale v. Rogers,* 357 U.S. 197, 209-10, 78 S.Ct. 1087, 1094, 2 L.Ed.2d 1255 (1958), citing *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 350-51, 29 S.Ct. 370, 379-80, 53 L.Ed. 530 (1909), and *Hovey v. Elliott,* 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897); accord *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 705-06, 102 S.Ct. 2099, 2105-06, 72 L.Ed.2d 492 (1982). Sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the judicial process justifies a presumption that its claims or defenses lack merit. *Insurance Corp. of Ireland,* 456 U.S. 694, 705-06, 102 S.Ct. 2099, 2105-06; *Societe Internationale,* 357 U.S. at 209-10, 78 S.Ct. at 1094; *Hammond Packing,* 212 U.S. at 350-51, 29 S.Ct. at 379-80.

Whether the denial of due process occurred at the trial or appellate level should not be controlling. In short, there are Constitutional limitations on all courts, whether state or federal, trial or appellate. It is not sufficient grounds to abridge a litigants' rights to due process merely

because it is the appellate court's docket that is overburdened.[6]

In fact, there may be more of a compelling reason for dismissal (i.e., permitting "death penalty" sanctions) when the violation was at the trial court level and the result of the violation deprived the opposing party of discovery needed to prosecute or defend his claim. *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 53 (1909). In that situation, dismissal can be at least more justly upheld if the failure to produce requested documents gave rise to and supported the permissible presumption that if the requested and ordered documents were produced, they would not be favorable to the party resisting production, and, therefore, that the case (appeal) lacked merit. The application of this presumption gives rise to situations where the court can take certain facts, such as personal jurisdiction, as true, such as was done in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705-06, 102 S.Ct. 2099, 2105-06, 72 L.Ed.2d 492 (1982). The situations in *Hammond Co. Packing* and *Insurance Corp. of Ireland, Inc.* are clearly distinguishable and far more supportive of death penalty sanctions than in matters on an appeal where the development of the opposing parties' case is not impaired by a party's lack of information or lack of strict compliance with appellate court rules or orders.

In some cases, such as where a party refuses to bring their brief in compliance despite the imposition of lesser sanctions, it may well be within the court's discretion to presume that an asserted claim or defense lacks merit and thereby dispose of the appeal accordingly. See *Insurance Corp. of Ireland,* 456 U.S. at 705-06, 102 S.Ct. at 2105-06. In Petitioners' case, the infraction was limited to a single violation of a subsection of one of the Court's rules which was caused, in part, by a breech of duty by a public official. The brief had numerous case cites and contained thirty-five (35) references to the transcript in support of their assertions. Moreover, this

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6 Whether a denial of due process arose because of a party's violation of a discovery deadline, or because of a lack of compliance with some other type of court rule or order, should, likewise, not be controlling. See *Hovey v. Elliott,* 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897).

absence of a greater number of references was, to some degree, explained by the fact that the transcript was largely non-existent at the time the original brief, and even the later allowed amended brief, was due to be filed.

Therefore, although punishment and deterrence are legitimate purposes for sanctions, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (per curium); *Bodnow Corp. v. City of Hondo,* 721 S.W.2d 840 (Tex. 1986), they do not justify "trial" by sanctions. They also do not justify disposition by sanctions "on appeal." *See Hammond Packing,* 212 U.S. at 350-51, 29 S.Ct. at 379-80; *Hovey,* 167 U.S. at 413-14, 17 S.Ct. at 843. Sanctions which are so severe as to preclude presentation of the merits of the case should not be assessed against a party absent his flagrant bad faith or strong evidence of not only his counsel's callous disregard for the responsibilities of meeting the rules required for presenting a proper appeal, but also the client's knowledge and participation of the same. See *National Hockey League,* 427 U.S. at 642-643, 96 S.Ct. at 2780-81.

In assessing sanctions, especially death penalty sanctions, the Court must look at the entire record. Some of those circumstances relevant to this appeal include: (1) the breach of duty by the District Clerk; (2) the two meritless appeals, subsequent reversals and cost to Petitioners (3) the fact that Petitioners met all other briefing requirements; (4) the sole deficiency was the number of citations to the transcript (the brief had only thirty-five [35] record cites and the court felt it needed more); (5) the relative harm caused by the conduct versus the sanction, e.g. since this was an appeal of an order granting summary judgment, and such review is "de novo," the court, arguably, needed to review the entire record under any circumstances;[7] (6) the degree of harm when viewed in contrast with the value of the underlying judgment to these litigants and the cost of its

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7 *Douglass V. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

dismissal[8]; (7) the fact that there is no clear case law as to when and how often cites to the record are required; (8) the fact that the deadline to amend the brief ran before the clerk had fixed the record (the amended brief was filed in June, while the district clerk did not complete the preparation of the supplemental transcript until August); (9) the fact that there was never a court order directed toward Petitioners to rebrief; (10) the politics of this case and the seriousness of the alleged facts; (11) the trial court's finding regarding the lack of merit of the underlying Bill of Review; and (12) the fact that the merits of this underlying case against Respondents has never been examined.

When all of the relevant circumstances are considered, it is clear that Petitioners should not have had their causes of action dismissed. Initially, they were in substantial compliance with the rules. The statement of facts must summarize the material facts necessary for the court to understand the issues presented for review, and without which the court would be unable to consider the legal claims. A brief is clearly deficient if it totally omits a statement of the facts from the record. However, in cases such as with Petitioners' appeal, where there was an accurate, cogent statement of facts, "deficiency" is a much more vague question. Certainly the facts should be presented accurately, even if they are allowed to be cast in the light most favorable to the party presenting the issue on appeal.

Although the original statement of facts had few record citations, it thoroughly examined the factual and legal history of the case as it related to the issues on appeal. Although it did not, and at that point could not, contain a plethera of record cites, it was also "accurate" and fairly substantiated by the record presented at trial. This is evidenced by the fact that in its Second Amended Brief, each factual statement which had been made by the Petitioners in their earlier brief was supported by the record eventually filed. In fact, the Second Amended Brief, which was offered on

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8 The only result in allowing Petitioners to rebrief would have been delay -- delay in a highly political case, which had already been successfully delayed by Respondents through an erroneously filled bill of review and two prior meritless orders of dismissal at the trial court level.

rehearing together with a Motion for Leave to Amend, contained 194 references to the various volumes of transcript on file. Thus it appears that Petitioners' underlying brief, and particularly even the statement of facts as contained therein, met the purpose of a properly prepared statement of facts generally required on appeal. Since the appellate court must make a full review of the entire record regardless of the number of the citations contained in the brief on appeal, there is some argument that the harm it does and the inconveniences to the court don't warrant a complete sacrifice of a party's causes of action.

Also, it is true that, generally, courts of appeals need not consider points of error or arguments that are merely poorly articulated, undeveloped general statements or themes which do not reflect sound legal reasoning. In a summary judgment situation, the appellant preserves its point of error by stating that the trial court erred in granting summary judgment. They can then proceed to show "why" they are entitled to relief in their argument which follows. In this case the Petitioners presented points of error to the effect that the trial court erred in granting summary judgment, then went further and explained to the court, through clear, cogent arguments, why reversal was required on each particular cause of action. They then supported each of those arguments by well-reasoned precedent and clearly applicable authority. This is clearly not the type of conduct indicating the Petitioners or their counsel were consciously indifferent to the rules of briefing and appellate procedures.

The type of situation (where a reviewing court may refuse to address a claim because it was inadequately briefed) varies dramatically throughout and within the state and federal courts. On one end of the spectrum are cases involving briefs which are one paragraph long, cite no authority, do nothing but state the elements of negligence, without offering any arguments or authorities to support their claims. See *Goossen v. Estate of Standaert,* 525 N.W.2d 314 (Wis. Ct. App. 1994); *Allianz Insurance Company V. Gagnon,* 860 P.2d 720 (Nov. 1993) (Brief failed to cite to record; Appellant fined $1,000 to be paid to S. Ct. Law Library); *Insurance Corp. Of Ireland, Ltd. V. Compagnie Des Bauxites De Guinee*; 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed 2d 492 (1982) (Violation of multiple orders to produce discovery necessary for Plaintiffs case - struck claim of no

personal jurisdiction); *Casteel-diebolt V. Diebolt,* 912 S.W.2d 302 (Tex. App.-- Houston [14th Dist.] 1995, n.w.h.), (No legal authority or cites to trial court record); *Holt v. Sarver;* 442 F.2d 304 (8th Cir. 1971), (No cites to record; still the court searched the record and affirmed judgment on merits); *Douglass V. United Services Automobile Association,* 79 F.3d 1415 (5th Cir. 1996), (Poor briefing, etc. Appellate Court warns that further disregard for rules will result in dismissal); *Karl v. Davis,* 639 A.2d 214 (Md. App. 1994), (Cited once to the statement of facts; court issued warning); *United States v. Lynn;* 608 F.2d 132 (5th Cir. 1979), (Failed to adequately cite to record; court nevertheless reviewed the record of 50+ volumes); *Partin v. United States,* 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977), (Failed to cite to record, but court read entire trial transcript; issued warning); *Moore v. FDIC,* 993 F.2d 106 (5th Cir. 1993), (Brief contains only conclusions; no cites to records; appeal dismissed, but will be reconsidered with appropriate motion and evidence presented); and, *N/S Corporation, a Pennsylvania Corporation, v. Liberty Mutual Insurance Company*; 127 F.3d 1145 (9th Cir. 1997); (Brief was poorly done and only generally referred to the record; court reviewed the brief and found it sorely lacking, but still reviewed merits, then dismissal.). Next are situations in which a brief contains some argument, but no references to huge records (50+ volumes), causing the court to become so angry and disgusted that it spews contempt for the litigant and its counsel. *N/S Corporation v. Liberty Mutual Insurance Company*, 127 F3d 1145.[9] (Although, the court did, technically, dismiss the claim for poor briefing, it still made an exhaustive search of the record to determine if the dismissal was unjust or if the underlying claim had merit.)

Each of these cases stands in stark contrast to the case at bar, where the Petitioners' amended brief had a lengthy statement of facts, extensive well thought out arguments supported by eighty-four (84) separate cases,

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9 "This is a time when an appellant has approached our rules with such insouciance that we cannot overlook its heedlessness. We might have been inclined to overlook all of that, but after Liberty Mutual pointed to these failures, and others, in a motion to dismiss, N/S did not even deign to respond. More than that, it filed a reply brief in which it entirely omitted the table of contents and the tables of authorities cited. See Fed.R.App.P. 28(c)."

twenty (20) separate rules and statutes, resulting in a total of one hundred, thirty-three (133) cites to relevant authory as well as contained thirty-five (35) cites to the transcripts on file as of June 21, 1996. The sanction for Petitioners' deficient brief was to have the bulk of their case dismissed for lack of record cites and, later, to have their Motion for Leave to Amend the brief denied. If anything is clear in the present case, it is perhaps that the only parties who clearly played no part in this fiasco were the Petitioners. Although they may have technically had the burden to bring forth the record or appeal, they had no knowledge of its deficiencies and were never responsible for the care, custody or control of either courts' file.

Further, there is, likewise, nothing in the record to indicate that the court considered imposition of lesser sanctions or that any such lesser sanctions would not have been effective in eventually bringing the brief into compliance.[10] If anything, the record strongly suggests that lesser sanctions should have been utilized and would have been effective. In fact, the Second Amended Brief, which was submitted together with the Motion for Rehearing and Petitioners' Motion to Amend contained one hundred ninety four (194) cites to the now complete, eventually reconstructed record.

Despite this showing of effort, accuracy and contrition (as well as the Court's personal firsthand knowledge of the District Clerk's role in the problem through multiple motions on file), Petitioners were denied the opportunity to amend their brief and, thereby, denied their right to have their case decided on its merits.

Frequently, Texas courts will attempt to rationalize and justify dismissal of the heart of a litigants claim by stating that it did not affirm the judgment based on waiver because it left at least one of the points open for considerations on the merits. *Elder v. Bro;* 809 S.W.2d 799 (Tex.

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10 Just as with the trial court, the range of available sanctions for a party's abuse or rule violations was and is quite broad. The court could have ordered counsel to re-brief under TEX. R. APP. P. 83, by a specific date and punished any failure through lesser sanctions than dismissal; it could have taxed the costs of the delay against the Petitioners, awarded attorney's fees, or imposed a fine.

App.–Houston [14th Dist.] 1991, writ denied); *Henry S. Mill[er] Management Corp. V. Houston State Assoc.;* 792 S.W.2d 128 (Tex. App.–Houston [1st Dist.] 1990, writ denied); and *Tacon Mechanical Contractors, Inc. v. Grant Sheet Metal, Inc.*; 889 S.W.2d 666 (Tex. App.–Houston [14th Dist] 1994, writ denied). In short, in an effort to avoid an obvious due process violation, the courts will dismiss the most significant of claims (as in this case, the conspiracy and fraud claims against Wilson and Sewell & Riggs) then leave open the causes of action that it (the Court) feels could be more easily dismissed. As to the Petitioners' claims against their prior counsel, Fred Hagans, the court dismissed all points on appeal and affirmed his summary judgment solely based on waiver. Nothing in the record even approaches justification for so severe a sanction, especially in a situation arising from the alleged gross breach of the attorney-client relationship. *Casteel-diebolt V. Diebolt,*912 S.W.2d 302 (Tex. App.-- Houston [14th Dist.] 1995, n.w.h.); *Essex Crane Rental Corp. v. Striland Construction Co.* 753 S.W.2d 751 (Tex. App.-- Dallas 1988, writ denied). Essex has not argued or cited authority in support of these points, accordingly, points twenty-one and twenty-two are waived); *Holt v. Sarver;* 442 F.2d 304 (8th Cir. 1971), (Although it was not required to search record, here the court did search a "voluminous record," and found evidence to support the court's decision that the points should be overruled. Court then "affirmed" the judgment on merits, not as a sanction.); *Insurance Corp. Of Ireland, Ltd. V. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed 2d 492 (1982); and *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed. 747 (1976).

There are cases, of course, when striking pleadings, dismissal, rendition of default and other such extreme sanctions are not only "just," but may be truly justified, if not absolutely necessary. See *National Hockey League,* 427 U.S. at 642, 96 S.Ct. at 2780. The case at bar is <u>not</u> one of those cases. In *National Hockey League*, the Court upheld the lower court's dismissal, in spite of later compliance, because although the dismissal finally was punishment sufficient to result in party's compliance, the purpose of sanctions is not merely to punish the offender, but also to deter others from similar conduct. (Even then, the Court stated it would consider a timely filed Motion to Amend.) The Supreme Court in *National Hockey League* reasoned that allowing the court to dismiss the case under

such truly flagrant circumstances, would operate to deter others from engaging in the same type of conduct. (E.g., after seventeen months of substantially unanswered crucial discovery, despite a court order and in the face of warnings that this failure to provide certain information could result in the imposition of sanctions, National Hockey still failed to timely answer written interrogations).

In the case at bar, the offense was far less egregious and certainly not in flagrant bad faith. The record establishes that the record on appeal was lost by the clerk and had to be reconstructed through considerable effort of Petitioners' counsel. Thus the severe sanctions imposed by the court against Shari Bair, et al, were manifestly unjust and in direct violation of their constitutional right to due process by law.

Moreover, unlike *National Hockey League,* such sanctions cannot rest on the needs of the judicial system to deter similar abuses in the future. This, like many other similar opinions, will never make the law books or official reporters. This case is designated as an "unpublished" opinion under TEX. R. APP. P. 90. It offers no guidance and can never be cited as authority. Even if the Court had published the opinion, one might be hard pressed for the lesson here. In order to succeed in the "deterrence" tactic, the Court would need some consistency in its rulings. Otherwise, one might see a published opinion, but it may not indicate the Court's next ruling on the next set of similar facts. See, for example a comparison of the facts of this case at bar (insufficient record cites leads to Court finding waiver and refusing to look at underlying issues) versus the case of *Brown v. Canada*, 1991 WL 67054 (Tex.App.—Houston [14th Dist.] May 2, 1991) (unpublished). In *Brown*, the Appellant wrote a 3-sentence brief; the Court of appeals struck the brief and ordered the appellant to rebrief by a date certain. In so doing, the Court cited *Inpetco, Inc. v. Texas American Banks/Houston N.A.*, 729 S.W.2d 300 (Tex.1987) as its precedent. Even though the appellant started with a 3-sentence brief (which the court struck) and even though the appellant, in spite of a Court order to rebrief, failed to do so, the Fourteenth Court of Appeals still considered the underlying facts and circumstances in finding no abuse of discretion by the trial court in dismissing appellant's claim for want of prosecution, and denying the subsequently filed motion to reinstate. Curiously, Justice Cannon, who

wrote the underlying opinion in this case, also authored the *Brown* opinion. The same jurist, far worse facts, yet a completely different application of the exact same law.

Many other unpublished opinions portray similar inconsistencies. To cure the problem, Petitioners' counsel strongly urged the Texas Supreme Court to, at minimum, order publication of the opinion so that the rule would be clarified and thus others would be on notice as to the nature of conduct viewed by the courts as constituting such "flagrant bad faith" as to warrant dismissal. The Supreme Court declined to do so.

POINT 2

CAN A LITIGANT BE SUBJECT TO DEATH PENALTY SANCTIONS WHEN (HIS) VIOLATION WAS CAUSED, IN WHOLE OR IN PART, BY THE BREACH OF DUTY OF A PUBLIC OFFICIAL, IN THIS CASE, THE DISTRICT CLERK? DOES THE SAME CONSTITUTE A DENIAL OF (HIS) FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW?

The District Clerk is entrusted with, and has the duty to, maintain the Court's file. The Texas Government Code empowers the clerk of each civil district court to have custody of and to carefully maintain and arrange the records relating to or lawfully deposited in the clerk's office. TEX. GOV'T. CODE ANN. §51.303(a) (Vernon 1988). In Texas criminal courts, the duty of the clerk is promulgated in the Texas Code of Criminal Procedure. It, similarly, states as follows:

> Duty of Clerks
> C. Each clerk of the district or county court shall receive and file all papers and exhibits in respect to criminal proceedings, issue all process in such cases, and perform all other duties imposed by law.
> ...

TEX. CODE CRIM. PROC. ANN. art. 2.21 (Vernon 1981).

Despite this responsibility and duty of the district clerk and the fact that this case, brought against several high profile defendants and their respective high profile law firms, had been filed almost five years with depositions, motions and discovery produced, and finally, despite the fact that the summary judgments filed by each individual defendant and the responses filed thereto were enormous in volume due to the exhibits attached by all parties, when it came time to prepare the record on appeal in this case in response to a timely request by the Petitioners, the district clerk had only a handful of the most recently filed court documents in its custody. Despite the Clerk's duty to maintain the file, the clerk could offer no explanation other than "that was all they had."

Respondents, in response to Petitioners' Motion for Rehearing, argued that it was the Petitioners' job (and not the duty of the district clerk) to bring forth the appellate record. In support of this argument, Respondents cited *Guillen v. DeLeon*, 887 S.W.2d 503 (Tex. App. -- San Antonio 1994, no writ). The *Guillen* case however, dealt with the timely ***request*** for the record, not the actual ***production*** of the record, as one might infer from reading Respondents' response. Clearly, the Texas Legislature charged the District Clerk with the responsibility for custody of the court's file.[11] Any fault that the record is not available on appeal, despite a timely request, clearly lies with the District Clerk.

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11 The clerks of both the civil and criminal courts have the duty to maintain their respective court files. An injustice exists, not in the duties of the seemingly similar positions, but in the ramifications applied for each clerk's violation of that duty. In criminal appeals, failure by the clerk to produce the appellate record on appeal results in the Court's automatic granting of a new trial. *See Perez v. State*, 824 S.W.2d 565 (Tex. Crim. App. 1992) (ordering new trial where court reporter's tapes and notes lost), *Payne v. State of Texas*, 802 S.W.2d 686 (Tex. Crim. App. 1990) (ordering new trial where testimony of three witnesses missing from record), *Emery v. State of Texas*, 800 S.W.2d 530 (Tex. Crim. App. 1990) (ordering new trial where pretrial hearing notes lost), and *Dunn v. State of Texas*, 733 S.W.2d 212 (Tex. Crim. App. 1987) (ordering new trial where portions of pretrial hearings, voir dire, and testimony of witness missing). Common to all of the above criminal cases, is the fact that, through no fault of the defendant, the appellate record was not complete, making the appellant (defendant) entitled to a new trial. In civil cases, however, an incomplete record apparently shifts the responsibility of the clerk for maintenance of the file to the appellant, who must have a sufficient record on appeal to support its claims of error.

Because of the district clerk's complete failure to properly maintain the court file in this matter, Petitioners were forced to recreate the court's file in order for the district clerk to prepare the record on appeal. Literally thousands of documents were filed with the district clerk attached to motions to substitute lost documents. This process was far more laborious than might seem as, prior to submission of any motions to substitute the documents, all defendants had to agree that they were true and correct copies; otherwise, a hearing would have to be scheduled before the administrative judge of Harris County to make that determination. Because of the steps necessary to obtain, what should have been readily available documents, there resulted not only an obvious delay (compounded by the defendants' refusal to stipulate to the documents as originals), but also an inability to cite to a record which was not altogether on file. Petitioners' case was ultimately dismissed due to insufficient record cites.

Petitioners contend that the dismissal of their case based, in whole or in part, on the state of the insufficiency of the record, violated their right to due process of the law. U.S. CONST. amend. V, XIV.

POINT 3

IS TEXAS RULE OF APPELLATE PROCEDURE 74(F), SO VAGUE AS TO RESULT IN THE VIOLATION OF A LITIGANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW

Rule 74 (f) of the Texas Rules of Appellate Procedure provides:

> **(f) Argument.** A brief of the argument may present separately or grouped the points relied upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. (See Appendix D.)

The court's dismissal under Rule 74(f) is unconstitutional since the rule provides little or no clear guidance as to what is required before a litigant's cause of action can be dismissed based on his failure to adequately brief the points on appeal. It is only within Rules 74(o), 74(p) and 83 of the Texas Rules of Appellate Procedure that one finds guidance as to the appropriate actions of an appellate court when faced with what they consider to be inadequate briefing.

Initially Rule 74(p) provides as follows:

> **Briefing Rules to Be Constructed Liberally**. The purpose of briefs being to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same, a substantial compliance with these rules will suffice in the interest of justice; *but for a **flagrant violation** of this rule the court **may require the case to be rebriefed**.*

(Emphasis added).

Rule 83 provides:

> *A judgment shall not be affirmed* or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, *without allowing a reasonable time to correct or amend such defects or irregularities* provided the court may make no enlargement of the time for filing the transcript and statement of facts except pursuant to paragraph (c) of Rule 54 ...

(Emphasis added).

Rule 74(o) provides that:

> [i]f the court shall strike or refuse to consider any part of a brief, *the court **shall** on reasonable terms, allow the same to be amended or supplemented.*

(Emphasis added).

Petitioners contend that they provided nine well-articulated points for the court's consideration which were, to the best of their counsel's ability, adequately briefed. Although their brief may have been lacking in what the Court considered to be an appropriate number of cites to the record, the sanction of which appellants were given notice may result was contained within Rules 74(o), 74(p) and 83 of the Texas Rules of Appellate Procedure, to wit, for flagrant violations they may be ordered to rebrief. (see Appendix D). To this end, Petitioners were more than willing to do so. In fact, Petitioners, during oral argument, offered to amend, supplement and/or re-brief in accordance with the transcript finally on file. This did not invoke a favorable response by the court. In fact, counsel later tendered an amended brief and, although they tendered the amended brief with their Motion for Rehearing requesting leave to file the same, the request was denied. To the extent Petitioners' conduct is held to be a flagrant violation as contemplated by Rule 74(p), Petitioners contend that the term "flagrant" in this rule is unconstitutionally vague and deprives them of their due process rights. U.S. CONST. amend. V, XIV.

POINT 4

DOES THE VII AMENDMENT GUARANTEE A LITIGANT THE RIGHT TO A TRIAL BY JURY SO AS TO PRECLUDE SUMMARY JUDGMENT WHERE A GENUINE ISSUE OF MATERIAL FACT CONTINUES TO EXIST?

POINT 5

WHERE A SUMMARY JUDGMENT IS REVIEWED ON APPEAL "DE NOVO," DOES THE APPELLATE COURT'S FAILURE TO REVIEW THE RECORD IN THE LIGHT MOST FAVORABLE TO THE NON-MOVANT, CONSTITUTE A VIOLATION OF A LITIGANT'S RIGHT TO TRIAL BY JURY?

(Arguments for Points 4 and 5)

Standard of Review--Summary Judgment

At the trial court level, summary judgment for the defendant is proper when the proof shows that no genuine issue of material fact exists on one or more of the essential elements of the plaintiff's cause of action, or when defendant establishes each element of an affirmative defense as a matter of law. *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex.1990). A defendant who moves for summary judgment has the burden of showing that no material issue of fact exists on the plaintiff's cause of action. *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 166-67 (Tex.1987). A summary judgment for the defendant disposing of the entire case is proper only if he/she proves that, as a matter of law, the plaintiff could not succeed upon any theory pled. *Delgado v. Burns*, 656 S.W.2d 428, 429 (Tex.1983). It is only then that the non-movant must expressly present to the trial court any reason that would defeat the movant's right to summary judgment by filing a written answer or response to the motion. *McConnell v. Southside Indep. School Dist.*, 858 S.W.2d 337, 341 (Tex.1993). In fact, for years it was the law of our state (Texas) that a summary judgment must stand on its own merit and that a non-movant need not even respond to the motion unless it was insufficient as a matter of law to support summary judgment. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979). Although the court can determine legal insufficiency or "as a matter of law points" so as to allow the disposition of cases when the claim or defense has no legal merit, it cannot serve as fact finder without the litigant's consent.

Article VII provides "in suits at common law...the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court in the United States, than according to the rules of the common law." U.S. CONST. amend VII. Petitioners contend, however, that in this case, both the trial court and Court of Appeals strayed from the permissible boundaries honored by the common law, and resolved genuine issues of material fact themselves (against Petitioners) in violation of their (Petitioners') Seventh Amendment right to trial of those issues by a jury of their peers.

Ironically, the Court of Appeals threw out the Petitioners' Seventh Amendment claim because the Petitioners did not raise their objection to the trial court. In essence, the Respondents and the Court of Appeals

would require the Petitioners to file a motion with the trial court based on the fact that it (the trial court) had misapplied the standard for summary judgment, or otherwise assumed the role of "fact finder," contrary to Petitioners' election to trial by jury. Generally, this would be impractical, unnecessary and, as with other matters of law already reviewed and considered by the Trial Court, not required. (See TEX. R. APP. P. 52(d))

The result would more than likely have been similar to the Court of Appeals' response to the Petitioners' objection to its improper resolution, disputing material facts contrary to the evidence offered by the Petitioners; where the objection was made via a timely filed Motion for Rehearing it was summarily denied, without comment.

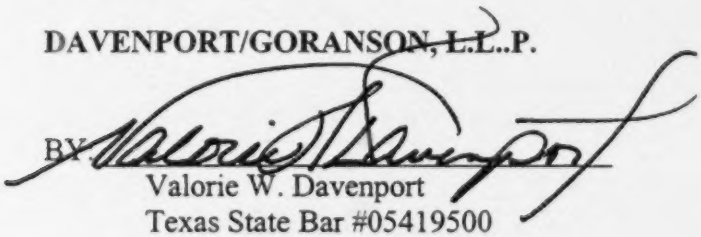
CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the opinion of the Fourteenth Court of Appeals affirming the summary judgment of the trial court and the Texas Supreme Court's denial of a Petition for Review in this matter.

DATED: December 22, 1998

Respectfully submitted,

DAVENPORT/GORANSON, L.L..P.

BY: 

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Attorney for Petitioners

APPENDIX A

NOTICE: NOT DESIGNATED FOR PUBLICATION. UNDER TEX.R.APP. P.90 UNPUBLISHED OPINIONS MAY NOT BE CITED AS AUTHORITY.

Shari BAIR, et. al., Appellant

v.

William Fred HAGANS, et. al., Appellee

No. 14-95-00316-CV.

Court of Appeals of Texas, Houston (14th Dist.).

May 29, 1997.

On Appeal from the 157th District Court Harris County, Texas Trial Court Cause No. 89-50647.

OPINION

CANNON.

*1 This is an appeal from a summary judgment. Appellants Shari Bair, individually and as representative of the estate of C.W. Bair, Peter Voskamp and Jerry Amussen (collectively "appellants"), brought this suit against three attorneys (Hagans, Abrams, and Matthews), two law firms (Sewell & Riggs and Hagans & Sydow), and a private investigator (Wilson) alleging a series of torts in connection with the appellees' filing of a bill of review action. The

defendant-appellees fall into three groups: Hagans and Hagans & Sydow (hereafter "Hagans"), Abrams, Matthews, and Sewell & Riggs (hereafter "Sewell & Riggs"), and Clyde Williams (hereafter "Williams"). The appellees all filed motions for summary judgment and the trial court granted those motions. In four points of error, appellants claim (1) the trial court erred in granting the summary judgment motions, and (2) the granting of the summary judgment motions denied them the right to trial by jury. We affirm.

I. Background

In 1982, appellants filed a stock fraud suit against Roman F. Arnoldy, John Arnoldy, and Triten Corporation (hereafter "the Arnoldy case"). The jury in that case returned a verdict in favor of appellants, but the trial court entered a judgment notwithstanding the verdict. The First Court of Appeals reversed the jnov. and entered judgment on the jury verdict on November 12, 1987. Appellee Hagans represented appellants in that case, along with attorney John O'Quinn. Appellees Matthews, Abrams, and Sewell & Riggs represented the defendants. After oral argument before the Court of Appeals, appellants Sewell and Riggs discovered facts which led them to believe O'Quinn had tampered with the jury in the Arnoldy case. Tom Alexander, acting as a special prosecutor for the State Bar of Texas, had also discovered the information during a barratry investigation targeting O'Quinn. Alexander, who retained Wilson as an investigator in the barratry investigation, reported the tampering charges to the Harris County District Attorney's office. Sewell & Riggs later also retained Wilson to continue the investigation into the tampering charges. In the course of investigating the barratry charges for Alexander and the tampering charges for Sewell & Riggs, Wilson obtained two affidavits from Hagans, who had severed his partnership with O'Quinn. Wilson also contacted two other witnesses and received affidavits concerning jury tampering from them. Sewell & Riggs provided this information to the District Attorney's office.

At this point, Sewell & Riggs filed a motion for rehearing in the Court of Appeals partially based on the allegations of jury tampering. The First Court of Appeals overruled this motion, but noted that "the contentions advanced should properly be resolved by appropriate bill of review proceedings, where evidence may be presented and a thorough factual determination made." Voskamp v. Arnoldy, 749 S.W.2d 113, 127 (Tex.App.--Houston [1st Dist.] 1987, writ denied). Only four days after the November 12, 1987 Court of Appeals opinion in the Arnoldy case, appellants moved in the trial court to enter judgment on the verdict. Upon a motion from Sewell & Riggs, the Court of Appeals issued an injunction enjoining appellants from interfering with its jurisdiction until issuance of its final mandate on November 18, 1987. On July 17, 1987, the Court of Appeals entered its mandate.

***2** After the judgment of the Court of Appeals but prior to the final mandate, Sewell & Riggs filed a bill of review action in the 11th District Court in Harris County. The bill of review raised the same jury tampering allegations raised in the motion for rehearing. On April 14, 1989, before the bill of review went to trial on the merits, the trial court entered an agreed order that forbade the appellants from attempting to enforce the Arnoldy judgment for 120 days and requiring the appellants to provide 10 days notice to Sewell & Riggs before attempting to enforce the judgment thereafter. This order noted that all the affected parties "appeared to advise the Court that all of the [parties] have agreed to this Order." On March 28, 1990, the trial court entered a take nothing judgment in the bill of review action, noting that "a compromise and settlement of the prior action in [the Arnoldy case] has been negotiated and agreed upon and that as a part of the compromise and settlement agreement the parties expressed their desire that the Court dismiss this Bill of Review proceeding."

While the bill of review action was still pending in the trial court, appellants filed this action in district court and a parallel suit in probate court. After the settlement agreeing to dismiss the bill of

review, the appellees moved for summary judgment in this case. The trial court granted summary judgment as to all defendants. Appellants now appeal from that judgment.

II. Waiver of Error

Appellants' brief in this case, and their record submitted on appeal, so fail to meet the requisites laid out by the Rules of Appellate Procedure as to waive virtually all error. An appellant bears the burden to adequately brief his points of error, citing this court to relevant pages in the record and to supporting legal authority. Tex.R.App. P. 74(d) ("In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found"); Id. at 74(f) ("The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and ... the authorities relied upon for reversal"). When an appellant fails to cite authority supporting a point of error, he waives that point of error. Trenholm v. Ratcliff, 646 S.W.2d 927, 934 (Tex.1983); Casteel-Diebolt v. Diebolt, 912 S.W.2d 302, 304-05 (Tex.App.--Houston [14th Dist.] 1995, n.w.h.). Furthermore, failure to cite this court to relevant portions of the record also waives appellate review. Casteel, 912 S.W.2d at 305; Tacon Mechanical Contractors v. Grant Sheet, 889 S.W.2d 666, 671 (Tex.App.--Houston [14th Dist.] 1994, writ denied). As we have stated before, "this Court has no duty to search a voluminous record without guidance from appellant to determine whether an assertion of reversible error is valid." Casteel, 912 S.W.2d at 305; Stevens v. Stevens, 809 S.W.2d 512, 513 (Tex.App.--Houston [14th Dist.] 1991, no writ); Most Worshipful Prince Hall v. Jackson, 732 S.W.2d 407, 412 (Tex.App.--Dallas 1987, writ ref'd n.r.e.). The appellant bears the burden to demonstrate that the record supports his contentions and to make accurate references to the record to support his contentions on appeal. Casteel, 912 S.W.2d at 305; Elder v. Bro, 809 S.W.2d 799, 801 (Tex.App.--Houston [14th Dist.] 1994, writ

denied).

*3 Appellants wholly fail to adequately present their contentions on appeal. The record in this case consists of an original transcript and three supplemental transcripts. In total, the record amounts to 16 volumes and 3,710 pages. [FN1] In the entire preliminary statement and procedural history section of their brief, appellants include only one citation to the record. In fact, the one record citation included in this section does not refer us to summary judgment proof, but to exhibits attached to appellants' pleadings in this case (the exhibit referred to is a letter from the trial judge expressing concern about whether the bill of review proceeding was used as "leverage" against the appellants, in light of the severity of the charges). In the twenty page section of appellants' brief that attacks the summary judgments granted as to appellants' causes of action, they provide little additional reference to the record. Appellants divided this section into eight subsections, based on various cause of action. Five of these subsections (discussing claims of abuse of process, breach of the attorney-client relationship, intentional infliction of emotional distress, negligent misrepresentation and negligence per se) contain no citations to the appellate record whatsoever. Another subsection, discussing appellants' claims of civil conspiracy, contains only a single citation to the record--the same letter cited in the general statement of facts. Still another subsection, addressing claims of tortious interference with contract, fails to cite any legal authority. Only one of the subsections in this section of appellants' brief, a discussion of claims of malicious prosecution against Sewell & Riggs, contains citations both to the appellate record and to relevant legal authority.

> FN1. Several of the Appellees argue that even after being allowed to supplement the record three times, appellants still failed to include items necessary for our review. We do not reach these contentions.

This court granted appellants four extensions of time to file their brief (a total of 210 days) and also allowed an amendment to their original brief. The amended brief did not remedy the inadequacies of the first. We hold that by failing to adequately brief their claims, appellants have waived all arguments on appeal save those complaining of the trial court's grant of summary judgment on their claims of malicious prosecution. We will now address only those claims.

III. Standard of Review--Summary Judgment

At the trial court level, summary judgment for the defendant is proper when the proof shows that no genuine issue of material fact exists on one or more of the essential elements of the plaintiff's cause of action, or when defendant establishes each element of an affirmative defense as a matter of law. Black v. Victoria Lloyds Ins. Co., 797 S.W.2d 20, 27 (Tex.1990). A defendant who moves for summary judgment has the burden of showing that no material issue of fact exists on the plaintiff's cause of action. Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 166-67 (Tex.1987). A summary judgment for the defendant disposing of the entire case is proper only if, as a matter of law, plaintiff could not succeed upon any theory pled. Delgado v. Burns, 656 S.W.2d 428, 429 (Tex.1983). The non-movant must expressly present to the trial court any reason that would defeat the movant's right to summary judgment by filing a written answer or response to the motion. McConnell v. Southside Indep. School Dist., 858 S.W.2d 337, 341 (Tex.1993). However, a summary judgment must stand on its own merits; the non-movant need not respond to the motion to contend on appeal that it is insufficient as a matter of law to support summary judgment. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex.1979). If the non-movant fails to present an issue to the trial court, he may not later plead that new ground as error on appeal. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678-79 (Tex.1979).

IV. Malicious prosecution

*4 In their malicious prosecution claim, appellants argue that Sewell & Riggs instituted the bill of review action in bad faith in order to force settlement of the judgment in the Arnoldy suit. In a suit for malicious prosecution, the plaintiff must plead and prove the following:

1. the institution or continuation of judicial proceedings;
2. by, or at the instance of the defendant(s);
3. malice in the commencement of the proceedings;
4. termination of the proceedings in the plaintiff's favor; and
5. damages.

James v. Brown, 637 S.W.2d 914, 918 (Tex.1982). Because we hold appellees showed no genuine issue of material fact existed as to appellants' damages from the bill of review action, we overrule this point of error.

We note at the outset that the filing of a bill of review action does not affect the finality of the judgment sought to be set aside. Schwartz v. Jefferson, 520 S.W.2d 881, 889 (Tex.1975). Once the final mandate was issued from the court of appeals, appellants may have enforced the Arnoldy judgment. See Tex.R.App. P. 87(a) ("When the judgment of the appellate court affirms the judgment of the trial court ... the trial court need not make any further order or decree and the clerk of the trial court shall proceed to issue execution thereon as in other cases"). None of the actions of Sewell & Riggs prevented that enforcement. Appellants argue the injunction granted against them preventing execution of any judgment prior to the issuance of mandate by the court of appeals in the original Arnoldy appeal "interfered with the legitimate property of Appellants," and that this interference supplied evidence of damages from the bill of review action. However, the bill of review action and the injunction of the court of appeals were unrelated. The court of appeals issued an injunction solely to

protect its jurisdiction in the original appeal.

We also note that appellants had signed an agreed order in the Arnoldy suit preventing enforcement of the judgment for 120 days, a period that ended not quite a month after issuance of the appellate court mandate. After the 120 day period, appellants could have enforced the agreement upon ten days written notice to Sewell & Riggs. Appellants gave no written notice of enforcement. By their own agreement, appellants could not have enforced the Arnoldy judgment until conclusion of the 120 day period. After that time, nothing prevented enforcement except notice from appellants.

The facts in this case clearly show that the bill of review action instituted by Sewell & Riggs had no effect on enforcement of the Arnoldy judgment, as alleged by appellants. Because this leaves no genuine issue of material fact as to damages from appellants' claims of malicious prosecution, we hold that the trial court's grant of summary judgment was proper. Accordingly, we overrule appellants' first three points of error.

V. Denial of the Right to Trial by Jury

*5 In their fourth point of error, appellants claim the trial court denied them their right to trial by jury in granting summary judgment, in violation of the U.S. and Texas Constitutions. Appellants failed to raise these claims in the trial court. A failure to present a claim, even a claim of constitutional magnitude, at the trial court level waives that claim. Dreyer v. Greene, 871 S.W.2d 697, 698 (Tex.1993); Tex.R.App. P. 52(a). We overrule appellants' fourth point of error.

VI. Conclusion

Having found no merit in any of appellants' points of error, we affirm the judgment of the trial court.

Panel consists of Justices ANDERSON, O'NEILL, and CANNON. [FN2]

FN2. The Honorable Bill Cannon sitting by assignment.

APPENDIX B

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 **(512) 463-1312**

April 09, 1998

Ms. Valorie W. Davenport
Davenport Goranson
1100 Louisiana, Suite 4450
Houston, TX 77002

Mr. Richard A. Sheehy
McFall Sherwood & Sheehy
909 Fannin Street, Suite 2500
Houston, TX 77010-1003

Mr. Knox D. Nunnally
Vinson & Elkins
1001 Fannin, Suite 2300
Houston, TX 77002-6760

Mr. John H. Stevenson
Barnett & Craddock
1001 Fannin, Suite 3801
Houston, TX 77002

RE: **Case Number 97-0934**
Court of Appeals Number: 14-95-00316-CV
Trial Court Number: 89-50647

Style: **SHARI BAIR, individually and as representative of the ESTATE OF C.W. BAIR, PETER VOSKAMP, and JERRY AMUSSEN**
v.
WILLIAM FRED HAGANS, SEWELL & RIGGS, BARRY ABRAMS, WILLIAM MATTHEWS, CYCLE WILSON, and HAGANS & SYDOW

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/
Michael C. Murphey, Deputy

cc: Ms. Mary Jane Smart, Clerk
Mr. Charles Bacarisse

APPENDIX C

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 **(512) 463-1312**

July 30, 1998

Ms. Valorie W. Davenport
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Mr. Richard A. Sheehy
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Vinson & Elkins
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Houston, TX 77002-6760

Mr. John H. Stevenson
Barnett & Craddock
1001 Fannin, Suite 3801
Houston, TX 77002

RE: **Case Number 97-0934**
Court of Appeals Number: 14-95-00316-CV
Trial Court Number: 89-50647

Style: **SHARI BAIR, individually and as representative of the ESTATE OF C.W. BAIR, PETER VOSKAMP, and JERRY AMUSSEN**
v.
WILLIAM FRED HAGANS, SEWELL & RIGGS, BARRY ABRAMS, WILLIAM MATTHEWS, CYCLE WILSON, and HAGANS & SYDOW

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above styled petition for review.

Sincerely,

John T. Adams, Clerk

by /s/
Michael H. Kopp, Deputy

cc: Ms. Mary Jane Smart, Clerk
Mr. Charles Bacarisse

APPENDIX D

TEXAS RULE OF APPELLATE PROCEDURE 74

Tex. R. App. 74

REQUISITES OF BRIEFS

Briefs shall be brief. Briefs shall be filed with the Clerk of the Court of Appeals. They shall be addressed in to "The Court of Appeals" of the correct district. In civil cases the parties shall be designated as "Appellant" and "Appellee," ...

(a) Names of All Parties to the Trial Court's Final Judgment. A complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court ...

(b) Table of Contents and Index of Authorities. ...

(c) Preliminary Statement. The brief should contain a brief general statement of the nature of the cause or offense, i.e., whether it is suit for damages on a note, or a prosecution for murder, and the result in court. ...

(d) Points of Error. A statement of the points upon which an appeal is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. ...

...

(f) Argument. A brief of the argument may present separately or grouped the points relied upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. ...

(g) Prayer for Relief. ...

...

(o) Amendment or Supplementation. Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe, and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the

same to be amended or supplemental.

(p) Briefing Rules to be Construed Liberally. The purpose of briefs being to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same, a substantial compliance with these rules will suffice in the interest of justice; but for a flagrant violation of this rule the court may require the case to be rebriefed.

...

APPENDIX E

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

March 21, 1996

RE: Case No. 14-95-00316-CV

Style: Bair, Shari, et al.
V. Hagans, William Fred

Please be advised that, on this date, the Court GRANTED appellants' motion for leave to file supplemental transcript in the above cause; time extended to and including April 4, 1996, however, parties will not be permitted to re-brief referencing the supplement transcript.

T.C. Case # 89-50647 **Mary Jane Smart, Clerk**

Valorie W. Davenport
1100 Louisiana
Suite 4450
Houston, TX 77002

APPENDIX F

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

April 25, 1996

RE: Case No. 14-95-00316-CV

Style: Bair, Shari, et al.
V. Hagans, William Fred

Please be advised that, on this date, the Court GRANTED appellants' motion for leave to file supplemental transcript in the above cause; time extended to and including May 20, 1996. Appellant's brief may be amended with transcript references.

T.C. Case # 89-50647 **Mary Jane Smart, Clerk**

Valorie W. Davenport
1100 Louisiana
Suite 4450
Houston, TX 77002

APPENDIX G

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

August 7, 1997

RE: Case No. 14-95-00316-CV

Style: Bair, Shari, et al.
V. Hagans, William Fred

Please be advised that on this date the Court DENIED appellant's motion for leave to file amended brief in the above cause.

T.C. Case # 89-50647 **Mary Jane Smart, Clerk**

Valorie W. Davenport
1100 Louisiana
Suite 4450
Houston, TX 77002

APPENDIX H

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

August 28, 1997

RE: Case No. 14-95-00316-CV

Style: Bair, Shari, et al.
V. Hagans, William Fred

Please be advised that on this date, the Court OVERRULED appellants' amended motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, September 29, 1997.

T.C. Case #89-0647 **Mary Jane Smart, Clerk**

Valorie W. Davenport
1100 Louisiana
Suite 4450
Houston, TX 77002

Supreme Court, U.S.
FILED
JAN 28 1999
CLERK

No. 98-1033

In The

Supreme Court of the United States

October Term, 1998

SHARI BAIR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF C. W. BAIR, ET AL.,

Petitioners,

v.

WILLIAM FRED HAGANS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Fourteenth Court Of Appeals Of Texas

BRIEF OF RESPONDENT WILLIAM FRED HAGANS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RICHARD A. SHEEHY
Counsel of Record

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OR CALL COLLECT (402) 342-2831

22pp

QUESTIONS PRESENTED

1. Whether the refusal by a state court of appeals to consider an issue on the merits violates due process when the party raising that issue fails to comply with a state rule of appellate procedure that requires the party to make proper citations to the record and legal authorities.

2. Whether a party suffers a violation of due process when the district clerk ultimately files a complete record with the court of appeals, and the party fails to cite the court of appeals to places in the record that support his position on appeal.

3. Whether the procedure in Texas state courts for summary judgments, which is substantially the same procedure as in federal court, violates a party's federal constitutional right to a trial by jury.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings set out in the petition for writ of *certiorari* are accurate with one exception. Petitioners raised a complaint against the law firm of Hagans & Sydow in the trial court, but omitted the firm as a Defendant in Plaintiffs' Third Amended Original Petition which was the controlling pleading at the time the trial court ruled on the motions for summary judgment. (Tr. 2). Under Texas law, the omission of a party defendant in a pleading acts as a dismissal of that party. *Evans v. Hoag*, 711 S.W.2d 744, 746 (Tex. App. – Houston [14th Dist.] 1986, writ ref'd n.r.e); *Burton v. Bridges*, 641 S.W.2d 635, 637 (Tex. App. – El Paso 1982 writ ref'd n.r.e.). As a result, Hagans & Sydow should no longer be a party to this case.

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BRIEF OF RESPONDENT WILLIAM FRED HAGANS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE UNITED STATES SUPREME COURT:

Respondent William Fred Hagans ("Mr. Hagans"), files this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners Shari Bair, Individually and as Representative of the Estate of C.W. Bair, et al. ("Petitioners").

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourteenth Judicial District of Texas is unpublished, but it is printed as an appendix to the petition for writ of *certiorari*. (Pet. at Appendix A). The Supreme Court of Texas denied the petition for review of that opinion, and also denied the motion for rehearing. (Pet. at Appendices B, C).

JURISDICTION

Mr. Hagans agrees that this Court has jurisdiction under 28 U.S.C. § 1257, although Mr. Hagans does not believe the Court should exercise that jurisdiction to consider the petition for writ of *certiorari*. Further, Mr. Hagans would point out that the original petition for writ of *certiorari* was filed on or about October 29, 1998; however, it apparently had some missing pages and errors,

and the clerk of the Court advised Petitioners that they could file an amended petition that corrected those errors. Petitioners did not file their final petition for writ of *certiorari* until December 22, 1998, almost two months later. Under these circumstances, Mr. Hagans questions whether the petition for writ of *certiorari* was filed timely. SUP. CT. R. 13; 28 U.S.C. § 2101(c).

RULES OF COURT

Petitioners have set forth a number of constitutional provisions, statutes, and rules of Court in the petition for writ of *certiorari*. However, the opinion below was based almost entirely on former TEX. R. APP. P. 74. For some reason, Petitioners did not include that rule in their petition. The relevant portions of former Rule 74 are as follows:

RULE 74 REQUISITES OF BRIEFS

(d) **Points of Error.** A statement of the points upon which an appeal is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found . . .

(f) **Argument.** A brief of the argument may present separately or grouped the points relied upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference

to the pages in the record where the same may be found; and (2) such discussion of the facts and authorities relied upon as may be requisite to maintain the point at issue . . .

STATEMENT OF THE CASE

Given the disposition of this case by the Texas court of appeals, and the issues raised in the petition for writ of *certiorari*, Mr. Hagans does not believe it is necessary or appropriate to set forth in detail the facts of this case on the merits. The Texas court of appeals affirmed the judgment of the trial court because Petitioners failed to comply with the Texas Rules of Appellate Procedure. The petition for writ of *certiorari* challenges that procedural ruling; as a result, Mr. Hagans will limit his discussion in this response to the procedural issues raised by Petitioners in this Court. The opinion by the Texas court of appeals correctly states the nature of the case. (Pet. at Appendix A).

Regardless, given the admonition by the Court in SUP. CT. R. 15.2, Mr. Hagans rejects and denies any allegation that he breached any duty or conspired in any way to harm Petitioners. Mr. Hagans did what every lawyer is supposed to do: cooperate with a state bar association in its investigation of alleged unethical conduct. He should be commended for his conduct, rather than be subjected to unsupported and unprofessional attacks. The state trial court properly granted a summary judgment to him.

Consistent with their practice in the Texas appellate courts, Petitioners do not include in their petition here "a

concise statement of the case setting out the facts material to consideration of the questions presented." SUP. CT. R. 14.1(g). Instead, they engage in a rambling and unsupported attack on the district clerk of Harris County and Respondents. They avoid the procedural history of the case that is the basis for the decisions of the state appellate courts. For purposes of the issues raised in the petition for writ of *certiorari*, the Court should take note of that procedural history:

(1) On February 21, 1995, Petitioners perfected their appeal in the state court of appeals.

(2) On March 22, 1995, Petitioners filed the original transcript of four volumes. Under former TEX. R. APP. P. 74(k), their brief was due in the court of appeals on or before April 21, 1995.

(3) On April 21, 1995, Petitioners moved the court for an additional 60 days in which to file their brief. The court of appeals granted the motion and ordered Petitioners to file their brief on or before June 5, 1995.

(4) On June 5, 1995, Petitioners moved the court for an additional 90 days in which to file their brief. The court of appeals granted the motion in part and ordered Petitioners to file their brief on or before August 4, 1995.

(5) On August 3, 1995, Petitioners moved the court for an additional 30 days in which to file their brief. The court of appeals granted the motion and ordered Petitioners to file their brief on or before October 2, 1995, with the notation there would be no further

extensions of time. The court granted Petitioners 30 days more than they requested.

(6) On October 2, 1995, Petitioners moved the court for an additional two days in which to file their brief. The court of appeals granted the motion.

(7) On October 4, 1995, Petitioners finally filed their initial brief in the state court of appeals.

(8) On December 6, 1995, Respondents Sewell & Riggs, Barry Abrams and William Matthews filed their brief in the court of appeals. At that time, they raised the argument that Petitioners had waived their complaints on appeal because Petitioners did not include references to the record in their statement of facts and argument. These same arguments were made shortly thereafter in the briefs filed by the other Respondents including Mr. Hagans.

(9) On March 4, 1996, Petitioners filed their motion to supplement the record with various documents from the trial court, including the motions for summary judgment that were the focal point of the appeal. This motion for leave to supplement the record was filed three months after certain Respondents pointed out the deficiencies in the record. It was also five months after Petitioners filed their initial brief in the court of appeals to challenge the rulings by the trial court. The court of appeals granted the motion, and ordered Petitioners to supplement the record by April 4, 1996.

(10) On April 3, 1996, Petitioners moved the court for an additional 30 days in which to file the supplemental transcript. The court of appeals granted the motion.

(11) On April 19, 1996, Petitioners filed their amended motion to extend time to file the supplemental transcript and also requested leave to file an amended brief to include the missing citations to the record. The court of appeals granted the motion and ordered the supplemental transcript and amended brief filed on or before May 20, 1996.

(12) On May 20, 1996, Petitioners moved the court for an additional 21 days in which to file the supplemental transcript and amended brief. The court of appeals granted the motion, and ordered the supplemental transcript and amended brief filed on or before June 21, 1996.

(13) On June 21, 1996, Petitioners filed eight volumes of a supplemental transcript and their amended brief. The amended brief was filed 14 months after their brief was due in the court of appeals under the state rules.

(14) On July 19, 1996, Petitioners filed their motion for leave to file another supplemental record to include additional items in the record. The court of appeals granted the motion.

(15) On November 13, 1996, the court of appeals heard oral argument in the case.

(16) On May 29, 1997, the court of appeals issued its opinion and judgment. At no

> time between oral argument and the date of judgment did Petitioners seek leave of court to amend their brief a second time.

The court of appeals held that Petitioners waived their arguments on appeal because they failed to meet the requirements of former TEX. R. APP. P. 74. In particular, they did not adequately brief their points of error, and did not cite the court to relevant pages in the record and supporting legal authority. (Pet. at Appendix A at 4), *citing* TEX. R. APP. P. 74; *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302 (Tex. App. – Houston 1995, no writ). The court concluded that Petitioners had "wholly fail[ed] to adequately present their contentions on appeal," even after four extensions of time to file their brief. (*Id.* at 5-6). The Texas Supreme Court granted Petitioners two extensions of time to file their petition for review, but declined to review the judgment of the court of appeals. (Pet. at Appendices B, C).

ARGUMENT

1. The state court of appeals did not violate any due process rights of Petitioners by refusing to consider arguments that failed to meet usual and necessary rules of appellate procedure.[1]

This case is simply not appropriate for review by this Court. This case presents a classic situation where a party has utterly failed to comply with the appellate rules

[1] This portion of the argument is responsive to points 1 and 3 in the petition for writ of *certiorari*.

despite being given every opportunity to do so. There was no excuse for Petitioners' failure to provide the court of appeals with the appropriate citations in the record to support their argument.[2] The ruling by the court of appeals was not based on a technical defect; Petitioners filed a rambling and disjointed brief in the court of appeals that was not supported by proper citations to either the facts or the law. Numerous courts in the federal system have adopted the same reasoning used by the state court here. *E.g., Mitchell v. General Electric Co.*, 689 F.2d 877 (9th Cir. 1982) (court dismisses appeal for failure to cite court to evidence in record); *McGoldrick Oil Co. v. Campbell, Athey & Zukowski*, 793 F.2d 649 (5th Cir. 1986) (brief stricken for failure to include record citations in statement of facts); *Security and Exchange Commission v. Thomas*, 765 F.2d 825 (10th Cir. 1992) (court not required to manufacture a party's argument on appeal when party has failed to cite court to error in record).

Petitioners claim that the state courts somehow violated their right to due process when the court of appeals applied former TEX. R. APP. P. 74 which requires a party to provide the court proper record and legal citations.[3] That

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[2] Of course, Mr. Hagans submits that there is a good reason why Petitioners did not comply with Rule 74 in this respect, namely, that the record does not support Petitioners' factual statements in their brief in the court of appeals. Mr. Hagans pointed out several times in his brief that Petitioners' alleged statement of facts was not supported by the record. (*See* Brief for Appellee William Fred Hagans at 16n, 17-18).

[3] The Texas Rules of Appellate Procedure have been amended, but the requirement that a party provide the court with proper citations has not changed. *See* TEX. R. APP. P. 38.1.

requirement is not unique or unusual; in fact, it is critical to a proper review of the case. "Appellate rules governing the form of briefs do not exist merely to serve the whimsy of appellate judges. Some of the requirements, such as what should be included in the statement of the case, are essential for the proper disposition of an appeal." *Slack v. St. Louis County Government*, 919 F.2d 98, 99 (8th Cir. 1990), *quoting Hamblin v. County of Los Angeles*, 803 F.2d 462, 464 (9th Cir. 1986). The court in *N/A Corporation v. Liberty Mutual Insurance Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997), stated the principle in a different way: "In order to give fair consideration to those who call upon us for justice, we must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief. Hence, we have briefing rules."

The Court will note that the requirements of former TEX. R. APP. P. 74 are essentially the same as FED. R. APP. P. 28(a)(4). Further, several federal courts of appeals have local rules that emphasize the importance of proper record and legal citations. 4th Cir. L.R. 28(g) (references to record required); 5th Cir. L. R. 28.2.3 (same); 7th Cir. L.R. 28(c) (no fact stated unless supported by record references); 9th Cir. L. R. 28-2.3 (every assertion about matter in record must be supported by reference).

Petitioners filed their original brief on October 4, 1995, after receiving an additional six months to do so from the court of appeals. The original brief directed the court of appeals to the record only once. Petitioners were on notice no later than December 6, 1995 that their brief was deficient under former TEX. R. APP. P. 74 when certain Respondents filed their brief and argued that Petitioners had waived their points of error by failing to provide

proper citations to the record. Mr. Hagans made the same argument when he filed his brief on February 8, 1996.

After receiving permission from the court of appeals, Petitioners filed an amended brief and supplemental record on June 21, 1996, eight months after they filed their original brief. The amended brief did not make any substantial changes except Petitioners made reference to a few pleadings in the record. Petitioners did not support the factual allegations in the brief in any way by record citations. The preliminary statement in the amended brief, which covered nine pages, contained only a single record citation that was a letter that was not a part of the summary judgment proof. Many of the citations in the entire amended brief were to that letter.

The clerk's record in the case, after it was supplemented, contained 16 volumes with over 3,700 pages. The court of appeals correctly concluded that Petitioners waived their claims because they did not direct the court to the "page of the record where the matter complained of is to be found." TEX. R. APP. P. 74(d); *Henry S. Miller Management Corp. v. Houston State Associates*, 792 S.W.2d 128, 133-135 (Tex. App. – Houston [1st Dist.] 1990, writ denied) (court declines to search 651 page transcript and a 1,823 page statement of facts for error); *Johnson v. State Farm Mutual Automobile Insurance Co.*, 762 S.W.2d 267 (Tex. App. – San Antonio 1988, writ denied) (no record references showing preservation of complaint on appeal). The court would have reached the same result under the federal rules. *E.g., Mitchell v. General Electric Co.*, 689 F.2d at 878 (court declines to review 10 days of depositions to "ferret out facts" on which Plaintiff relies).

Mr. Hagans realizes that courts of appeals often accept the burden to search the record when an attorney fails to comply with briefing rules; however, Petitioners' conduct here was such a departure from customary and necessary rules of appellate procedure that the state court of appeals properly declined to undertake that task. This Court should not require any state court of appeals or Respondents as a matter of federal constitutional law to remedy Petitioners' incoherent ramblings, especially when Petitioners had seven months to review the record and provide the lower court with reasonable support for their arguments.

Petitioners do not argue strongly that they complied with former TEX. R. APP. P. 74 when they filed their brief and amended brief in the court of appeals; instead, they: (1) blame the district clerk's office for failing to prepare a proper transcript; (2) blame the court of appeals for not ordering them to amend their brief a second time after oral argument; and (3) blame the court of appeals for not reaching a constitutional challenge that they never raised in the trial court. None of these arguments has merit.

Given the history of the case, and the purpose behind rules of appellate procedure, Petitioners simply cannot show that they were deprived due process when the court of appeals refused to consider arguments not supported by proper record or legal citations.[4] Despite their protests to the contrary, Petitioners were not "in substantial compliance with the rules." (Pet. at 18). In fact, the

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[4] Petitioners' argument that former TEX. R. APP. P. is unconstitutionally vague is not supported by any legal authority even in this Court. (Pet. at 26-28).

court of appeals gave Petitioners multiple chances to comply with the minimum but necessary "Requisites of Briefs" set forth in former TEX. R. APP. P. 74. The procedural history of this case, as set out in the opinion by the court of appeals and this brief, compels the conclusion that Petitioners were given all the process they were due.

2. Petitioners cannot avoid their duties under former TEX. R. APP. P. 74 by blaming the district clerk.

Petitioners next argue that the District Clerk of Harris County was responsible for Petitioners' waiver of their arguments on appeal.[5] The argument is frivolous because the court of appeals ultimately had the entire record for review. There is no complaint in this Court that the record, as supplemented, was not complete. It may be true that the file from the trial court did not contain all original documents that were relevant on appeal when Petitioners requested the transcript; however, all parties promptly agreed to substitute copies of any relevant pleadings and motions for use by the court of appeals. In its opinion, the court of appeals did not rule that Petitioners had waived their complaints for failure to bring a complete record to the court for review; rather, the court held that Petitioners failed to cite the court to the record that existed. Petitioners cannot shift the blame to the district clerk for their failure to take actions that were completely within Petitioners' control.

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[5] This argument is responsive to point 2 in the petition for writ of *certiorari*.

Petitioners filed their initial brief in October 1995. Had they reviewed the transcript at that time, and complied with former TEX. R. APP. P. 74 by directing the court to the "page of the record where the matter complained of is to be found," they would have known that there were items missing from the clerk's record. Petitioners waited over a year to supplement the original record and then filed an amended brief that still did not have the proper citations to the record. The error was theirs alone.

Further, under former TEX. R. APP. P. 50(d), Petitioners had the duty to see that an adequate appellate record was brought to the court of appeals.[6] Under Texas law, even if the problem was an inadequate record, rather than inadequate citations to the existing record, Petitioners could not avoid waiver of their complaints by blaming the district clerk. *Guillen v. DeLeon*, 887 S.W.2d 503 (Tex. App. – San Antonio 1994, no writ) (burden on appellant alone, not district clerk, to bring forth record on appeal); *Okere v. Apex Financial Corp.*, 930 S.W.2d 146 (Tex. App. – Dallas 1996, writ denied) (right to appellate review accompanied by a duty to provide adequate record). As a result, Petitioners' attempts to blame the district clerk for their own failure to cite the record properly do not have merit and should be rejected by this Court.

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[6] Under Rule 35.3(a) of the new Texas Rules of Appellate Procedure, that duty is now with the clerk; however, there is no dispute that the former rules apply to this case. *See Final Approval of Revisions to the Texas Rules of Appellate Procedure* (August 15, 1997).

3. Plaintiffs have no constitutional challenge to the Texas rule on summary judgment.

In their fourth and fifth points, Petitioners claim that the Texas rule on summary judgment, TEX. R. CIV. P. 166a, violates their right to trial by jury. (Pet. at 28). Petitioners implicitly concede they raised this argument for the first time in the state court of appeals, not the trial court. (Pet. at 8). These arguments fail for at least four separate and independent reasons:

(a) Petitioners waived their constitutional challenge by failing to raise it in the trial court. In Texas, as in the federal courts, a party must present an issue to the trial court for ruling in order to claim error on that issue on appeal. *Singleton v. Wulfe*, 428 U.S. 106 (1976); *Dryer v. Greene*, 871 S.W.2d 697 (Tex. 1993); *General Motors Acceptance Corp. v. Harris County Municipal Utility District*, 899 S.W.2d 821, 825 (Tex. App. – Houston [14th Dist.] 1995, no writ); TEX. R. APP. P. 52(a). There is no reason why Petitioners could not have made their constitutional challenge in the trial court at the time the motions for summary judgment were heard. They could and should have included the argument when they filed their responses to the motions. They failed to preserve any error on these issues.

(b) Petitioners have no federal constitutional challenge based on denial of a right to trial by jury because the seventh amendment does not apply to state court proceedings. Petitioners argue that TEX. R. CIV. P. 166a deprived them of their federal constitutional right to trial by jury, but that right in civil cases applies only in federal courts. *Pearson v. Yewdell*, 95 U.S. 294 (1877); *Colgrove v.*

Battin, 413 U.S. 149, 169n (1973) (Marshall, J., dissenting); *Young Brothers & Co. v. Cigna Worldwide Insurance Co.*, 882 F.Supp. 1468 (E.D. Pa. 1994). There is no violation of federal law because federal law does not apply to this case.

(c) Summary judgment does not violate a right to trial by jury. The Texas rule is very similar to the federal rule on summary judgments. *Compare* TEX. R. CIV. P. 166a *with* FED. R. CIV. P. 56. The law is settled that these rules do not violate due process. *See generally* 10A Wright, Miller & Kane, *Federal Practice & Procedure* §§ 2711, 2714 (1998); *Carraba v. Employers Casualty Co.*, 742 S.W.2d 709 (Tex. App. – Houston [14th Dist.] 1987, no writ); *Swafford v. Holman*, 446 S.W.2d 75 (Tex. Civ. App. – Dallas 1969, writ ref'd n.r.e.).

(d) As far as Mr. Hagans is concerned, the Court need not address the issues raised by Petitioners on the validity of the summary judgment procedure. The court of appeals affirmed the summary judgment because Petitioners failed to comply with the rules of appellate procedure. Although Mr. Hagans submits that the summary judgment was proper, the court of appeals did not reach the judgment on the merits. The only issue before the Court here is whether there is a federal due process violation when an appellate court holds that a party waives error under the facts of this case. The court of appeals did not discuss the procedure in the trial court (Appendix A at 8); the opinion dealt mainly with the procedure in the appellate court. The constitutional issue was not decided by the court of appeals.

CONCLUSION AND PRAYER

For the reasons set forth in this brief in opposition, and the opinion by the Texas court of appeals, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

SHARI BAIR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF C. W. BAIR, PETER VOSKAMP, AND JERRY AMUSSEN,

Petitioners,

v.

WILLIAM FRED HAGANS, SEWELL & RIGGS, BARRY ABRAMS, WILLIAM MATTHEWS, CLYDE WILSON AND HAGANS & SYDOW,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT CLYDE WILSON'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is the appellate court's action in striking petitioners' points of error on appeal a death penalty sanction which must meet the test of *Societe Internationale v. Rogers*, 357 U.S. 197 (1958)? If so, did the court err in finding petitioners waived points of error after petitioners filed an inadequate brief, requested and were granted leave to file an amended brief, and subsequently filed an amended brief which contained points of error having little or no cites to the appellate record?

2. Can a litigant be subject to death penalty sanctions when petitioners filed an inadequate brief, requested and were granted leave to file an amended brief, and subsequently file an amended brief containing points of error having little or no cites to the appellate record even though the documents petitioners claim were needed were included in the appellate record on file at the time petitioners' amended brief was filed?

3. Is Texas Rule of Appellate Procedure 74(f) so vague as to result in the violation of a litigant's rights to due process and equal protection under the law?

4. Does the Seventh Amendment guarantee a state court litigant the right to trial by jury so as to preclude summary judgment where no genuine issue of material fact continues to exist?

5. Where a summary judgment is reviewed on appeal "de novo," does the state appellate court's failure to review the record in the light most favorable to the non-movant, constitute a violation of a litigant's Seventh Amendment right to trial by jury?

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings are as follows:

1.	PETITIONERS	ATTORNEYS
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9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2301, at 14 & n.14 (3rd ed. 1995) 16

OPINIONS BELOW

Respondent Wilson's motion for summary judgment was granted by the 157th District Court in Harris County, Texas. A final judgment was entered on November 23, 1994, when summary judgment was granted for the only remaining defendant. The Fourteenth Court of Appeals of Texas affirmed summary judgment in favor of Wilson on May 29, 1997. The Supreme Court of Texas denied petitioners' petition for review on April 9, 1998. The Supreme Court of Texas denied petitioners' motion for rehearing of petition for review on July 30, 1998.

OBJECTION TO JURISDICTION

This Court lacks jurisdiction to review petitioners' claims under 28 U.S.C. § 1257. Petitioners have failed to meet their burden of showing the constitutional issues were properly presented to the Supreme Court of Texas. *See Adams v. Robertson*, 520 U.S. 83 (1997).

STATEMENT OF CASE

Wilson Seeks and Is Granted Summary Judgment. Clyde Wilson filed a motion for summary judgment, three supplements to this motion, and numerous exhibits attached thereto. Summary judgment was granted in favor of Wilson on April 18, 1994. Tr. 902.

Petitioners' Appeal. A final judgment in this case was entered on November 23, 1994, granting summary judgment for the only remaining defendant. Petitioners

filed their appeal bond and perfected their appeal on February 21, 1995. The original transcript containing four volumes was filed on March 22, 1995. After being granted four extensions totaling over 210 days, the petitioners filed their brief on October 12, 1995. Wilson filed his reply brief on February 8, 1996. All respondents argued in their briefs that petitioners had waived any argument and specifically identified the inadequacy of the record and deficiencies in petitioners' brief.

On March 4, 1996, petitioners moved for leave to file a supplemental transcript to include additional materials in the transcript. The Fourteenth Court of Appeals of Texas granted the motion, and stated that re-briefing would not be permitted. Petitioners filed a motion for extension of time and reconsideration of the re-briefing decision. The Fourteenth Court of Appeals of Texas granted the extension of time on April 25, 1996, and allowed plaintiffs to amend their brief with transcript references. On May 20, 1996, petitioners filed a second motion for extension of time to file the supplemental transcript. The Fourteenth Court of Appeals of Texas granted petitioners' motion, giving them until June 21, 1996 to supplement the transcript.

On June 21, 1996, petitioners filed their Amended Brief of Appellants, along with the First and Second Supplemental Transcripts (eight volumes total). On July 19, 1996, Petitioners again moved for leave to supplement the transcript. The Fourteenth Court of Appeals of Texas granted the motion on July 25, 1996, giving Petitioners until August 19, 1996 to file a supplemental transcript. The Third Supplemental Transcript was filed on August 19, 1996 (four volumes).

Summary Judgment Affirmed. The Fourteenth Court of Appeals of Texas affirmed summary judgment in favor of Respondent Wilson. Petitioners' Appendix A. The Court of Appeals found that all causes of action pertaining to Respondent Wilson were waived as petitioners failed to provide an adequate brief, even after being given the opportunity to supplement the transcript and file an amended brief. The Court of Appeals found that because the "amended brief did not remedy the inadequacies of the first" petitioners had waived all their summary judgment claims as to Respondent Wilson. Petitioners' Appendix A at *4-5. The Court of Appeals also held that petitioners waived their constitutional complaints by failing to raise them in the trial court. Petitioners' Appendix A at 6-8. The petitioners filed a Petition for Review with the Texas Supreme Court which was denied, and a motion for rehearing which was also denied by the Texas Supreme Court. Petitioners' Appendix B, C.

REASONS FOR DENYING THE WRIT

This Court Lacks Jurisdiction Under 28 U.S.C. § 1257.

This Court may not consider petitioners' points of error as they have failed to rebut the presumption that these issues were not presented to the Texas Supreme Court. In *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028 (1997), this Court held: "With 'very rare exceptions,' we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered

the decision we have been asked to review." *Adams*, 117 S.Ct. at 1029 (citations omitted). Pursuant to 28 U.S.C. § 1257, the only decision this Court can review is that of the highest court in the state, that being the Texas Supreme Court. As noted in petitioners' brief, the Texas Supreme Court denied their petition for review without opinion. (Petitioners' Brief at 2; appendix B to Petitioners' Brief). When the highest state court is silent on a federal question before this Court, it is assumed the issue was not properly presented and the aggrieved party has the burden of defeating that presumption. *Adams*, 520 U.S. at ___, 117 S.Ct. at 1029. Petitioners have failed to even attempt to rebut this presumption. As such, this Court is without jurisdiction to hear these matters.

Petitioners' False Premises

Petitioners' points of error are based on several premises which are false. Respondent Wilson will first address these misstatements made in petitioners' brief. Petitioners misstate the background facts in that they falsely accuse the district clerk of playing a role in their failure to cite to the record, and also misstate the Court of Appeals' reasoning for finding petitioners had waived certain points of error.

The District Clerk Played No Part In Petitioners' Failure To Provide An Adequate Brief

The first false premise proffered by Petitioners is that the district clerk had any responsibility for petitioners' utter failure to cite to the appellate record in their state court brief. In fact, petitioners' non-compliance with the

Texas Rules of Appellate Procedure was willful, solely the fault of petitioners, and demonstrates the contempt shown to the judicial system by these petitioners. Petitioners contend "[i]t was through no fault of Petitioners' counsel that the file was not properly maintained and, therefore, not available to properly cite on appeal." (Petitioners' Brief at 7). Petitioners also argue "[a]lthough she later got the right to amend one time in June, that was still at a time before the district clerk had completed his preparation of the supplemental transcript." (Petitioners' Brief at 8). Petitioners mislead the Court by failing to disclose that there was an appellate record on appeal to which petitioners could have cited, but simply chose not to do so. *Every single cite* to the third supplemental transcript in petitioners' proposed second amended brief cites to a document which was also contained in one of the transcripts already on file.

Petitioners Were Given Two Bites At The Apple To Comply With Briefing Requirements

Appendix A is a chart that cross references every cite to the Third Supplemental Transcript in petitioners' proposed second amended brief with a cite to one of the volumes available when the petitioners filed their first amended brief. There is not a single cite to a document that did not already exist. The documents cited by petitioners in the Third Supplemental Transcript were superflous. Therefore, despite petitioners' argument to the contrary, the district clerk played no part whatsoever in their failure to provide cites to the appellate record in their amended brief. Petitioners' failure is even more egregious in light of the fact that waiver of error occurred

after respondents had **specifically** pointed out the shortcomings of petitioners' original brief, and **after** petitioners were granted leave to file an amended brief.

Petitioners Fail To Correctly State Why The Court Of Appeals Found Waiver

Secondly, petitioners falsely argue "[t]he Court of Appeals' sole complaint was that the number of cites to the transcript (35) was insufficient under the circumstances." (Petitioners' brief at 12). This is not the case. The Court of Appeals did not judge the brief as a whole, rather analyzed it piece by piece. Although petitioners would have this Court believe the Court of Appeals' only complaint was the total number of cites, in reality the Court of Appeals stated:

> In the twenty page section of appellants' brief that attacks the summary judgments granted as to appellants' causes of action, they provide little additional reference to the record. Appellants divided this section into eight subsections, based on various causes of action. Five of these subsections (discussing claims of abuse of process, breach of the attorney-client relationship, intentional infliction of emotional distress, negligent misrepresentation and negligence per se) contain no citations to the appellate record whatsoever. Another subsection, discussing appellants' claims of civil conspiracy, contains only a single citation to the record – the same letter cited in the general statement of facts. Still another subsection, addressing claims of tortious interference with contract, fails to cite any legal authority.

(Petitioners' Appendix A at *3).

This excerpt shows the magnitude of petitioners' willful noncompliance with the Texas Rules of Appellate Procedure. The court of appeals found petitioners waived their points of error for their failure to comply with the rules of appellate procedure.

I. Petitioners Were Not Deprived Any Due Process Rights

In point one petitioners argue their due process rights were deprived when the Court of Appeals found they had waived their points of error on appeal. (Petitioners' Brief at 14). No due process rights were denied. The Court of Appeals was justified in finding petitioners waived their points of error because petitioners wholly failed to either cite to the appellate record or provide legal authority in their brief as required by law. *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322 (1909) involved a failure by the defendant to produce material evidence in its possession. 212 U.S. at 350. This resulted in the state court striking defendant's answer and entering a default judgment. This Court held:

> In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.

Hammond Packing Co., 212 U.S. at 351. In the case at bar, petitioners were specifically informed that their brief was inadequate as it failed to cite to the appellate record. Even though petitioners were given ample opportunity to file an amended brief, they still submitted a brief with

points of error completely devoid of a single cite to the appellate record. (Petitioners' Appendix A at *3). Another point of error found to be waived was completely devoid of any legal authority. (Petitioners' Appendix A at *3). Just as in *Hammond,* in the case at bar the preservation of due process was secured by the presumption that the refusal to cite to authority in the appellate record or legal authority was an admission of the want of merit in the asserted point of error.

Cases Cited By Petitioners Are Not Controlling

Petitioners' reliance on *Societe Internationale Pour Participation Industrielles et Commerciales v. Rogers,* 357 U.S. 197 (1958) is misplaced. (Petitioners' Brief at 14-15). In *Societe,* Swiss penal laws limited petitioner's ability to satisfy the pretrial production order because of criminal sanctions to which those producing the records would have been exposed. This Court held that Federal Rule of Civil Procedure 37 should not be construed to authorize dismissal of a complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply was due to petitioner's inability to produce the records, and not to willfulness, bad faith, or any fault of petitioner. *Societe Internationale v. Rogers,* 357 U.S. at 211-212. "Petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control." *Id.* Petitioners have failed to establish that their failure to comply with the briefing order of the court of appeals and the Texas Rules of Civil Procedure was caused by anything other than Petitioners' own conduct.

Petitioners cite *Inpetco, Inc. v. Texas American Bank*, 729 S.W.2d 300 (Tex. 1987) as precedent for appellate court leniency without informing this Court that the Texas Supreme Court has specifically limited the holding of that case. (Petitioners' brief at 23). The Texas Supreme Court reiterated the discretion of a Texas appellate court to affirm a judgment based on waiver of error by inadequate briefing as violative of the Texas Rules of Appellate Procedure in *Davis v. City of San Antonio*, 752 S.W.2d 518 (Tex. 1988), and in *Fredonia State Bank v. American Life Ins.*, 881 S.W.2d 279 (Tex. 1994). In *Fredonia*, the Court held:

> [T]he principal underlying the opinion in *Davis* is the settled rule that an appellate court has some discretion to choose between deeming a point waived and allowing amendment or rebriefing, and that whether that discretion has been properly exercised depends on the facts of the case. . . . Despite its broad language, *Inpetco* should not be read as overruling or modifying prior cases holding that error may be waived by inadequate briefing. . . .

Fredonia State Bank, 881 S.W.2d at 284. As such, *Inpetco* does not require a court to order rebriefing. Error may be waived by inadequate briefing. *Fredonia*, 881 S.W.2d at 284. Petitioners' same argument was put forth in *Happy Harbor Methodist Home, Inc. v. Cowins*, 903 S.W.2d 884 (Tex.App. – Houston [1st Dist.] 1995, no writ). The court held "Happy Harbor's reliance on *Inpetco* is misplaced. As the supreme court clarified in *Fredonia State Bank v. American Life Ins.*, 881 S.W.2d 279, 284 (Tex. 1994), 'an appellate court has some discretion to choose between deeming a point waived and allowing amendment or rebriefing.' " *Happy Harbor*, 903 S.W.2d at 887.

While the appellant in *Inpetco* did not have an opportunity to re-brief, Petitioners were given ample opportunity to amend their brief. The Fourteenth Court of Appeals of Texas was absolutely correct and fully within its discretion in holding that petitioners had waived any error through briefing deficiencies.

II. Petitioners Were Not Denied Fifth And Fourteenth Amendment Rights To Due Process

In point of error two, petitioners argue the Court of Appeals denied them due process rights under the Fifth and Fourteenth Amendments when it found petitioners waived certain points of error. Petitioners contend this "death penalty" sanction was due to a violation caused by the District Clerk. (Petitioners' Brief at 24).

Issue Not Raised In State Court

The issue presented to this Court, whether death penalty sanctions can be levied when the violation was due in part by the breach of a public official, was never presented to the state court. While petitioners did argue death penalty sanctions should not have been levied, the issue of whether these penalties may be imposed when a public official breaches his duty was neither raised nor argued to the state court. As such, this Court may not hear this claim.

No Death Penalty Sanctions

No "death penalty" sanctions were applied to Petitioners' appeal. The appellate court found that, after multiple opportunities to supplement the record and even after a chance to *amend* their brief, petitioners wilfully disregarded the Texas Rules of Appellate Procedure by failing to support their contentions with adequate record citations. (Petitioners' Appendix A at *3). This constituted a voluntary waiver. Waiver is the intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such a right. BLACK'S LAW DICTIONARY 1580 (6th ed. 1990). At this point, the appellate court was fully within its discretion in holding petitioners had waived those unsupported points. (Petitioners' Appendix A at *2); *see also* TEX.R.APP.P. 74(f), (o), (p) (currently TEX.R.APP.P. 38.1(d), (f), (h); 38.9(a)), and *Fredonia State Bank v. General American Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994). Petitioners' failure to comply with requisite appellate rules was not due to petitioners' inability, but rather resulted from petitioners' willfulness, bad faith, and was solely the fault of petitioners.

No Blame Rests With Clerk

Additionally, as fully explained, *supra*, it was entirely the fault of petitioners, and no fault of the District Clerk, that petitioners' amended brief contained points of error devoid of any cites to either the appellate record or to legal authority. Petitioners' second point of error is premised on the fact the district clerk was to blame for their

inadequate brief. As this premise is false, this Court must deny this point of error.

III. Petitioners' Vagueness Argument Fails

In point of error three petitioners argue that Texas Rule of Appellate Procedure 74(f) is unconstitutionally vague. (Petitioners' Brief at 26). Petitioners' claim fails for several reasons.

Petitioners Failed To Properly Present This Claim To State Court

A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon. *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). In *Bankers*, this Court found the petitioner's claim was not properly presented. *Id.* at 78. This was because petitioners failed to identify the Excessive Fines Clause, the Eighth Amendment, or the Federal Constitution in general. *Id.* at 77. Petitioners' claim of vagueness fails for similar reasons. Petitioners' argument to the Texas Supreme Court stated: "To the extent Petitioners' conduct, under these facts, was deemed to be so flagrant as to bypass rebriefing and warrant what was, in essence, death penalty sanctions, then Petitioners contend that the term "flagrant" as used in Rule 74 is vague and ambiguous and fails to provide adequate notice to the appellants or to the appellate courts so that uniform application of this standard will be applied." Petitioners failed to cite to the United States Constitution or to due process in general. This fails to

meet the minimal requirement that a federal claim was presented. *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988); *see also Webb v. Webb*, 451 U.S. 493, 496-97 (1981) (reference to "full faith and credit" in state court proceedings failed to raise a federal constitutional claim even though the State Constitution contained no full faith and credit clause). In fact, petitioners' first allegation that Texas Rule of Appellate Procedure 74(f) violated their right to due process under the Fifth and Fourteenth Amendment of the United States Constitution appeared in their Petition for Writ of Certiorari. (Petitioners' Brief at 28). Accordingly, this Court does not have jurisdiction to hear this issue.

Vagueness Argument Defeated By Actual Knowledge

Petitioners' argument is defeated because they had notice their conduct would put them at risk. In *Maynard v. Cartwright*, 486 U.S. 356 (1988), this Court held that "[o]bjections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know their conduct was at risk." *Id.* at 361. Petitioners' knowledge that their actions constituted waiver overcomes any vagueness argument. Petitioners were specifically informed of the inadequacies of their original brief, and all respondents argued that such failures amounted to a waiver of the issues since petitioners did not include the required parenthetical reference to the page in the record where the matter complained of is to be found. Tex. R. App. P. 74(d) . Respondents specifically referenced Texas case law which held that such a failure constituted waiver. *Arndt v. National Supply Co.*, 650 S.W.2d 547, 549

(Tex.App. – Houston [14th Dist.] 1983, writ ref'd n.r.e.) (finding point of error waived for failure to refer to error in record under predecessor rule TEX. R. CIV. P. 418(e)). After being put on notice that their failure to follow the Texas Rules of Appellate Procedure would result in a waiver of their points of error, petitioners asked for and were granted leave to file an amended brief. Although petitioners were specifically informed that Tex.R.App.P. 74(f) required them to cite to the appellate record, and despite the fact petitioners were specifically made aware of Texas cases which held failure to do so amounted to waiver, petitioners filed an amended brief having points of error which either failed to cite to the record or failed to cite any legal authority. Petitioners were given actual notice of the consequences of their actions, defeating any vagueness argument.

Petitioners have cited no authority to support their argument that briefing requirements such as those in the Texas Rules of Appellate Procedure are unconstitutionally vague. This is sufficient reason for this Court to deny the petition.

Petitioners Admit Minimum Guidelines Present

The legislature must provide minimal guidance to prevent a statute from being vague. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Petitioners admit in their brief that "[i]t is only within Rules 74(o), 74(p) and 83 of the Texas Rules of Appellate Procedure that one finds guidance as to the appropriate actions of an appellate court when faced with what they consider to be inadequate briefing." (Petitioners' Brief at 27). As petitioners

admit there are guidelines found in the Texas Rules of Appellate Procedure, their vagueness argument fails.

IV. Petitioners Were Not Denied Trial By Jury Under The Seventh Amendment

In points of error four and five, petitioners argue they were denied the right to a trial by jury under the Seventh Amendment. (Petitioners' Brief at 28). This argument also fails for several reasons.

Waiver Of Constitutional Argument Affirmed On Independent State Ground

Points four and five of petitioners' brief may not be considered by this Court as they were affirmed by an independent state ground, namely that petitioners waived their argument for failing to raise it in the trial court. (Petitioners' Appendix A at *5) (holding that the failure to present a claim, even a claim of constitutional magnitude, at the trial court level waives that claim.). This Court lacks jurisdiction to hear an issue if a state court's resolution of an issue of federal law rests on an adequate and independent state ground. *Sochor v. Florida*, 504 U.S. 525, 533 (1992). In *Sochor*, the state court found the constitutional issue regarding a jury instruction was waived because it was not raised in the trial court. *Id.* at 534. This Court held that the state court's rejection was based on the alternative state ground that the claim was not preserved for appeal. *Id.* Thus, this Court was without authority to address this issue. *Id.* Because the court of appeals held that petitioners waived this constitutional

issue since it was not raised in the trial court, this issue may not be addressed in this forum.

Seventh Amendment Does Not Apply To States

The Seventh Amendment right to a trial by jury is inapplicable to a suit in state court. In *Walker v. Sauvinet*, 92 U.S. 90 (1875), a case decided over 100 years ago, this Court decided this issue, holding that the Seventh Amendment relates only to trials in the courts of the United States. *Id.* at 92. A state, without violating the requirements of due process, may provide such a rule for its own courts, and may do away with the jury altogether. *Herron v. Southern Pac. Co.*, 283 U.S. 91, 93 (1931). More recently, this Court in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336-37 (1979) held that summary judgment does not violate the Seventh Amendment. *See also Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902) (summary judgment does not violate the Seventh Amendment). The Seventh Amendment "has not been made binding on the states . . . " 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2301, at 14 & n.14 (3rd ed. 1995), citing *Chicago, Rock Island & Pac. Ry. Co. v. Cole*, 251 U.S. 54, 56 (1919). Several Texas state court cases have rejected petitioners' argument that a summary judgment denies a party his constitutional right to a trial by jury. *See Carraba v. Employers Casualty Co.*, 742 S.W.2d 709 (Tex.App. – Houston [14th Dist.] 1987, no writ); *Mills v. Rice*, 441 S.W.2d 290 (Tex.Civ.App. – El Paso 1969, no writ); *Swafford v. Holman*, 446 S.W.2d 75 (Tex.Civ.App. – Dallas 1969, writ ref'd n.r.e.); *Wyche v. Works*, 373 S.W.2d 558, 561 (Tex.Civ.App. – Dallas 1962, writ ref'd n.r.e.). Petitioners' trial by jury due process argument is without merit.

Additionally, even if the Seventh Amendment did apply to the states, which it does not, petitioners have completely failed to alert this Court to the alleged genuine issue of material fact which they argue existed at the trial level. Before arguing they were denied a trial by jury because summary judgment was granted while genuine issues of material fact existed, petitioners must first set forth the alleged fact issues. This they did not do. Petitioners would have this Court simply take it on faith that there were genuine issues of material fact, without putting forth any evidence of such issues. As such, this petition must be denied.

CONCLUSION

For the foregoing reasons, and the opinion of the Texas Court of Appeals, the petition for writ of certiorari should be denied.

DATED: January 28, 1999.

Respectfully submitted,

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APPENDIX A

In this exhibit, "Tr.-1" would mean volume one of the original transcript. "2nd Supp. Tr.-1" would mean volume one of the second supplemental transcript.

Reference to Third Supplemental Transcript	Cross Reference to Same Document
p. 45-67	Tr.-1 p. 55-77
p. 151-160	Tr.-1 p. 45-54
p. 162-175	2nd Supp. Tr.-1 p. 121-135
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p. 438-443	2nd Supp. Tr.-3 p. 393-398
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p. 463	2nd Supp. Tr.-3 p. 418
p. 489	2nd Supp. Tr.-3 p. 444
p. 515	2nd Supp. Tr.-3 p. 470
p. 525	2nd Supp. Tr.-3 p. 480
p. 536-537	2nd Supp. Tr.-3 p. 491-492
p. 540	2nd Supp. Tr.-3 p. 495
p. 550-551	2nd Supp. Tr.-3 p. 146-146
p. 569-582	2nd Supp. Tr.-3 p. 524-527

p. 597-598	2nd Supp. Tr.-3 p. 552-553
p. 679-680	2nd Supp. Tr.-5 p. 896-897
p. 708-726	2nd Supp. Tr.-4 p. 699-717
p. 759-763	2nd Supp. Tr.-4 p. 749-753
p. 810-823	2nd Supp. Tr.-4 p. 800-813
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Supreme Court, U.S.
FILED
JAN 28 1999
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No. 98-1033

In The

Supreme Court of the United States

October Term, 1998

SHARI BAIR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF C.W. BAIR, PETER VOSKAMP, and JERRY AMUSSEN,

Petitioners,

v.

WILLIAM FRED HAGANS, SEWELL & RIGGS, BARRY ABRAMS, WILLIAM MATTHEWS, CLYDE WILSON, and HAGANS & SYDOW,

Respondents.

On Petition For Writ Of Certiorari To The Fourteenth Court Of Appeals Of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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1998

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

Petitioners seek this Court's review of a decision by the Fourteenth Court of Appeals of Texas finding that Petitioners waived most of their arguments on appeal by failing to support the legal and factual assertions in their brief with adequate record citations. The court of appeals granted Petitioners numerous extensions of time, both to file their brief and also to supplement the appellate record, and even allowed Petitioners to amend their brief. When Petitioners still failed to meet the minimum briefing requirements of the Texas Rules of Appellate Procedure, the court found that Petitioners had waived review of their unsupported points of error. In doing so, the court also declined to allow Petitioners a *second* opportunity to rebrief. The Fourteenth Court was fully within its discretion in thus disposing of Petitioners' appeal.

Petitioners have presented to this Court no question of federal law, no circuit conflict as to any issue, nor any conflict with the decisions of this Court. Petitioners can only hope to manufacture a constitutional issue by mischaracterizing, both legally and factually, the proceedings below. This case, however, presents nothing more than a question of state appellate procedure and is thus inappropriate for this Court's certiorari jurisdiction.

A. The petition misrepresents the Texas court of appeals' disposition of the case.

The Fourteenth Court of Appeals of Texas dismissed the majority of Petitioners' points of error because of the

fundamental insufficiency of the record citations in Petitioners' original and amended appellate briefs. App. A, at *2-3 ("Appellants wholly fail to adequately present their contentions on appeal.").[1] Yet, Petitioners argue throughout their Petition as if the appellate court's decision were based on insufficiencies in the *record itself*. Pet. at 6-8, 12-14, 24-26. The court of appeals, however, clearly explained that record insufficiency was not the basis for its decision. *See Bair v. Hagans*, 1997 WL 280451, at *3 n.1 ("Several of the Appellees argue that even after being allowed to supplement the record three times, [Petitioners] still failed to include items necessary for our review. *We do not reach these contentions.*") (emphasis added).[2] Second, in their zeal to complain about the appellate court's so-called "death penalty" sanctions, Petitioners gloss over the fact that the court did not base its entire disposition on waiver. The court of appeals found that Petitioners managed to support *one* subsection of their brief, devoted to malicious prosecution, with both record citations and legal authority. App. A, at *3 ("Only one of the subsections in this section of [Petitioners'] brief, a discussion of malicious prosecution against [Respondents], contains citations both to the appellate record and to relevant legal authority."). Reaching the merits of that issue, the court found that Petitioners could not show a genuine issue as to at least one element of

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[1] Petitioners have included the court of appeals' opinion in *Bair v. Hagans*, No. 14-95-00316-CV, 1997 WL 280451 (Tex. App. – Houston [14th Dist.] 1997, pet. denied) (unpublished) as Appendix A (App. A) to their petition.

[2] Petitioners did not include footnote 1 to the *Bair* opinion in their attached Appendix.

malicious prosecution – damages – and therefore affirmed the trial court's grant of summary judgment against Petitioners. App. A, at *4. The petition mentions this point only in support of the unfounded contention that Texas appellate courts frequently rely on waiver to dispose of all but the most unmeritorious points, "in an effort to avoid an obvious due process violation. . . . " Pet. at 21-22.

B. The petition misrepresents the nature of Petitioners' flagrant disregard for the Texas Rules of Appellate Procedure and unfairly shifts blame to the district clerk.

Petitioners represent that their appellate brief "met all the requirements of Rule 74 of the Texas Rules of Appellate Procedure *except that it had limited cites to the transcript on appeal.*" Pet. at 12 (emphasis added). Elsewhere, Petitioners emphasize that the deficiencies in their brief were "limited to a single violation of a subsection of one of the Court's rules" (Pet. at 16) and that "they were in substantial compliance with the rules." Pet. at 18. Nothing could be further from the truth. One need only read the court of appeals' opinion to appreciate Petitioners' inexcusable failure to comply with the rules of appellate procedure:

- "In the entire preliminary statement and procedural history section of their brief, [Petitioners] include only one citation to the record. In fact, the one record citation included in this section does not refer us to summary judgment proof, but to exhibits

attached to [Petitioners'] pleadings in this case. . . . " App. A, at *3.

- "In the twenty page section of [Petitioners'] brief that attacks the summary judgments granted as to [Petitioners'] causes of action, they provide little additional reference to the record." *Id.*
- "[Petitioners] divided this section into eight subsections, based on various causes of action. Five of these subsections . . . contain no citations to the appellate record whatsoever." *Id.*
- "Another subsection, dealing with [Petitioners'] claims of civil conspiracy, contains only a single citation to the record – the same letter cited in the general statement of facts." *Id.*
- "Still another subsection, addressing claims of tortious interference with contract, fails to cite any legal authority." *Id.*
- "This court granted [Petitioners] four extensions of time to file their brief (a total of 210 days) and also allowed an amendment to their original brief. *The amended brief did not remedy the inadequacies of the first.*" *Id.* (emphasis added).

Thus, the flaws in Petitioners' brief were far more than mere technical oversight. Pet. at 16-17. Instead, they were fundamental deficiencies that made Petitioners' arguments impossible to evaluate or analyze.[3]

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[3] Petitioners argue that their briefing failures were somehow harmless, "[s]ince the appellate court must make a

Unable to justify their egregious conduct, Petitioners prefer to scapegoat the district clerk. Throughout their petition, Petitioners blame the district clerk for "losing" the record and dramatize the "nightmare" of recreating that record for appeal. Pet. at 6-8, 12-14, 16-17, 21, 24-26. Any nightmare, however, was of Petitioners' own making.

The original four-volume transcript in this case was filed on March 22, 1995. After receiving four extensions (none of which, incidentally, was sought on the basis of the condition of the record), Petitioners had until October 4, 1995 to file their brief. Yet, Petitioners did not move to supplement the record until March 4, 1996 – *after* Respondents had filed their briefs pointing out Petitioners' deficient record cites.

The court granted every request made by Petitioners to supplement the record, and twice allowed Petitioners extensions to do so. The sum of all this activity was that, when Petitioners filed their *amended* brief on June 21, 1996, there were twelve volumes of transcript on file. Yet, Petitioners (1) still failed to include adequate record cites in their amended brief, and (2) now have the effrontery to

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full review of the entire record regardless of the number of citations contained in the brief on appeal." Pet. at 19. Petitioners misunderstand the nature of appellate review. Courts of appeal are not required to "independently search the statement of facts in an attempt to determine if the grounds of recovery have merit" nor to "search the record for evidence supporting a litigant's position under particular points of error. . . . " *Most Worshipful Prince Hall v. Jackson*, 732 S.W.2d 407, 412 (Tex. App. – Dallas 1987, writ ref'd n.r.e.); *see Saldana v. Garcia*, 285 S.W.2d 197, 201 (Tex. 1955).

tell this Court that "the transcript was largely *non-existent* at the time the original brief, *and even the later allowed amended brief*, was due to be filed." Pet. at 17 (emphasis added).[4] There was simply no relationship between the state of the record on appeal and Petitioners' failure to comply with the most fundamental rules of appellate procedure. In any event, the court of appeals expressly stated that it was not reaching the question whether there was any waiver based on inadequacies in the record.

C. The petition misrepresents the nature and disposition of the Bill of Review proceeding.

Although collateral to Petitioners' constitutional arguments, Respondents must correct Petitioners' misrepresentations regarding the underlying Bill of Review proceeding. Petitioners make numerous unsupported claims regarding the manner in which the jury tampering evidence on which the Bill of Review was based came to light. Pet. at 9-11. Respondents strongly disagree with Petitioners' allegations (1) that special prosecutor Tom Alexander and Respondent Clyde Wilson exceeded their

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[4] As yet another excuse for failing to adequately cite the record, Petitioners argue that they were required to file their amended brief on June 21, 1996, but that "the bulk of the supplemental record and lost documents were not gathered, authenticated and made available for citation until *August* of that same year." Pet. at 13. This is pure fantasy. Plaintiffs filed only *four* of the sixteen volumes of supplemental transcript on August 19, 1996 (after the amended brief had been filed), and, moreover, all of the documents contained in that filing could also be found in earlier filings, all of which were available to Petitioners when they filed their amended brief.

authority in investigating the jury tampering allegations; (2) that Alexander, Wilson, or Respondent Sewell & Riggs violated confidentiality or privilege in obtaining or disclosing such information; (3) that any of the information discovered by Alexander regarding alleged jury tampering by John O'Quinn was "false," "concocted" or "intentionally fabricated"; (4) that Respondent Wilson "extorted" information or suborned false testimony from any witnesses; and (5) that Respondent Sewell & Riggs harbored any improper motive in bringing the Bill of Review proceeding. These accusations are so outlandish that Respondents can only state that they are both unsupported and unsupportable.

Petitioners also egregiously misrepresent the disposition of the Bill of Review proceeding. Although Petitioners insinuate that the trial court "found" the Bill of Review lacking in merit, there was never such a "finding." Pet. at 11, 18. Indeed, because the parties *agreed* to dismiss[5] the Bill of Review in conjunction with the settlement of the underlying stock fraud action, there never was a trial on the allegations of jury tampering contained in the Bill of Review. The letter which Petitioners rely on (Pet. at 11-12, 18) contained the *personal* views of the trial

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[5] The trial court's take-nothing judgment on the Bill of Review was entered in accordance with the parties' settlement; the judgment specifically provides that "a compromise and settlement of the prior judgment . . . has been negotiated and agreed upon and that as a *part of the compromise and settlement agreement the parties expressed their desire that the Court dismiss this Bill of Review proceeding.*" (Emphasis added.) Therefore, that "dismissal" cannot be taken as any ruling whatsoever on the allegations of jury tampering in the Bill of Review.

judge, made without the benefit of any evidentiary hearing. Such a letter did not constitute a "ruling" or a "finding" regarding the Bill of Review proceeding. *See Goff v. Tuchscherer*, 627 S.W.2d 397, 398-99 (Tex. 1982) (a letter from the trial court is not the equivalent of a signed judgment). In any event, the First Court of Appeals of Texas did not share the trial judge's dim view of the Bill of Review proceeding: the First Court had previously observed that the allegations in the Bill of Review "[gave] rise to serious concern about whether there were improper communications with and undue pressure placed on the jury, both before and after verdict." *Voskamp v. Arnoldy*, 749 S.W.2d 113, 127 (Tex. App. – Houston [1st Dist.] 1987, writ denied) (on rehearing). Indeed, the First Court encouraged Respondents to bring the Bill of Review proceeding in the trial court. *Id.* at 127-28 ("[T]he contentions advanced should properly be resolved by appropriate bill of review proceedings, where evidence may be presented and a thorough factual determination made."). Because of the settlement, no "factual determination" was ever made on Respondents' Bill of Review, and Petitioners mislead this Court by representing otherwise.

Finally, Petitioners erroneously imply that the pendency of the Bill of Review damaged Petitioners by preventing them from executing on the underlying stock fraud judgment. Pet. at 12. Yet again, Petitioners obscure the truth. Before the court of appeals rendered a final judgment in *Voskamp, supra,* (and therefore while the appellate court retained exclusive jurisdiction over the case), Petitioners scheduled a hearing for entry of judgment in the trial court. The appellate court entered an

injunction simply to protect its own jurisdiction. The injunction therefore had nothing to do with the Bill of Review proceeding. Furthermore, Petitioners had signed an agreed order in the *Voskamp* suit which prevented enforcement of the judgment for 120 days, a period ending roughly a month after the issuance of the appellate court's mandate. App. A, at *4. When this agreed period ended, Petitioners were free to execute on their judgment, upon ten days' written notice to Respondents. *Id.* Thus, Petitioners' inability to execute on the stock fraud judgment was, likewise, completely unrelated to the Bill of Review proceeding.

REASONS FOR DENYING THE WRIT

The decision of the Fourteenth Court of Appeals of Texas involved the reasonable exercise of the appellate court's discretion in the face of repeated and inexcusable infractions of the Texas Rules of Appellate Procedure. Petitioners' arguments fail to raise an issue of federal law and their petition therefore does not warrant review by this Court.

A. Petitioners' erroneous "death penalty" argument does not raise an issue of federal law. (Pet. 14-24)

Petitioners quarrel with the Fourteenth Court's discretionary finding that Petitioners waived many of their points on appeal by committing flagrant violations of the briefing requirements contained in the Texas Rules of Appellate Procedure. Pet. at 14-24; App. A, at *2-3. Yet

none of Petitioners' misleading and erroneous arguments raises a federal question. This Court should therefore deny the Petition and expend its resources elsewhere.

Petitioners attempt to concoct a constitutional issue by arguing that the court of appeals' disposition constituted an abusive application of "death penalty" sanctions which deprived Petitioners of due process of law. Pet. at 14-15. Petitioners omit one key point, however: *no "death penalty" sanctions were applied to Petitioners' appeal.* Instead, the appellate court found that, after multiple opportunities to supplement the record and even after a chance to *amend* their brief, Petitioners simply failed to support their contentions with adequate record citations. App. A, at *3. At this point, the appellate court was fully within its discretion in holding that Petitioners had waived those unsupported points. App. A, at *2; *see also* Tex. R. App. P. 74(f), (o), (p) (currently Tex. R. App. P. 38.1(d), (f), (h); 38.9(a)), *and Fredonia State Bank v. General American Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994).

This Court has recognized that "the State certainly affords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule" and that "[t]he same rationale applies to the forfeiture of an appeal." *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). *See also Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-51 (1909). Petitioners were afforded their right to appeal "at a meaningful time and in a meaningful manner" when the appellate court granted them more than 210 days of extensions and an opportunity to rebrief. *Thomas*, 474 U.S. at 155; *Armstrong v. Manzo*, 380 U.S. 545,

552 (1965). But Petitioners repeatedly ignored the fundamental rules of briefing, even though Respondents objected to Petitioners' initial brief on the grounds of inadequate record cites and thereafter provided Petitioners with copies of missing documents. As demonstrated above, Petitioners' complaints about the district clerk are a feeble attempt to hide their own inexcusable negligence. *See* pp. 5-6, *supra*.

By failing to file even a minimally sufficient brief, Petitioners "intentional[ly] relinquished" their right to appellate review of the unsupported points of error. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The court of appeals reasonably and correctly exercised its discretion in refusing to allow a *second* rebriefing of the unsupported issues. That decision does not implicate an issue of either federal or constitutional law and should therefore not concern this Court.

B. Petitioners cannot blame the district clerk for their own flagrant disregard for the Texas appellate rules. (Pet. 24-26)

Petitioners' "Point 2" (Pet. at 24-26) essentially revisits the arguments made in their "Question 1" (Pet. at 14-24). Respondents again observe that the court of appeals' dismissal of the majority of Petitioners' points of error was based on waiver, and not on the insufficiency of the record itself. *See* pp. 2-3, *supra*. If, in drafting their appellate brief, Petitioners found inadequacies in the record, Texas law provided mechanisms for supplementing the record and for substituting copies for lost or inaccessible documents. *See* Tex. R. App. P. 50(e), 55(b)

(current version in Tex. R. App. P. 34.5(d), (e)). In fact, Petitioners took advantage of these procedures, and, with the assistance of Respondents' counsel, amassed a voluminous appellate record. Yet, Petitioners' appellate brief simply failed to reference that record sufficiently and, after a wasted opportunity to cure the deficiency, consequently waived the unsupported points. Again, Petitioners' attempt to scapegoat the district clerk does not create a federal issue appropriate for this Court's certiorari review.

C. Petitioners' vagueness argument defeats itself and fails to raise a constitutional issue. (Pet. 26-28)

Petitioners' vagueness argument is incomprehensible and internally inconsistent. Pet. at 26-28. Moreover, Petitioners present no case law in support of their contentions. Petitioners claim that Texas Rule of Appellate Procedure 74(f) (current version in Rule 38.1(h)) is unconstitutionally vague because it "provides little or no clear guidance as to what is required before a litigant's cause of action can be dismissed based on his failure to adequately brief the points on appeal." Pet. at 27. Yet, immediately following that assertion, Petitioners disprove their own argument by citing to Texas Rules of Appellate Procedure 74(p), 83, and 74(o), rules which provide "guidance as to the appropriate actions of an appellate court when faced with what [it] consider[s] to be inadequate briefing." *Id.* Petitioners received every indulgence contemplated by the rules and inexplicably failed to support their asserted errors with adequate record citations.

As Petitioners themselves point out (Pet. at 27), the rules of appellate procedure (1) allow a court of appeals to order rebriefing should a brief "flagrant[ly]" violate the rules; (2) mandate that a court of appeals allow a "reasonable time to correct or amend" briefing inadequacies that amount to mere "defects or irregularities, in appellate procedure, either of form or substance"; and (3) mandate that a court of appeals allow a brief to be "amended or supplemented" should the court strike or refuse to consider any part of a brief. Tex. R. App. P. 74(p), 83, 74(o) (current version in Tex. R. App. P. 38.9, 44.3, 38.7). By granting Petitioners multiple extensions for filing and for record supplementation, and, most importantly, by granting Petitioners the opportunity to rebrief, the court of appeals gave Petitioners every chance the appellate rules contemplate. Petitioners can find "vagueness" in the rules only by erroneously reading into them the requirement that an appellate court allow a *second* rebriefing of the issues. There simply is no such requirement.

Petitioners have not cited a single state or federal case holding that briefing requirements such as those in the Texas Rules of Appellate Procedure are unconstitutionally vague.[6] The rules at issue here, both on their face

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[6] Indeed, accepting Petitioners' arguments would require invalidation on vagueness grounds of Federal Rule of Appellate Procedure 28(a)(6) ("The argument must contain the contentions of the appellant . . . with citations to the authorities, statutes, and parts of the record relied on.") and Supreme Court Rule 24(1)(i) ("A brief . . . shall contain . . . [a] concise statement of the case . . . with appropriate references to the joint appendix . . . or to the record."), because arguably neither rule is

and as applied, gave Petitioners clear notice of their appellate brief's shortcomings. Moreover, in response to Petitioners' original brief, Respondents filed briefs setting forth in painstaking detail why Petitioners' record citations were inadequate and resulted in waiver of the unsupported points. Petitioners' *amended* brief was prepared in light of all this, and still failed to cure the deficiency. App. A, at *3 ("The amended brief did not remedy the inadequacies of the first."). The rules are not unconstitutionally vague simply because they did not explicitly inform Petitioners that utterly disregarding them *a second time* would result in waiver.

D. Petitioners waived their jury trial argument and, in any event, the Seventh Amendment does not apply. (Pet. 28-30)

Finally, Petitioners claim that, because the trial and appellate courts improperly resolved disputed fact issues on motion for summary judgment, Petitioners were therefore deprived of their Seventh Amendment right to a jury trial. Pet. at 28-30. Petitioners did not raise this constitutional issue at trial and have therefore waived it, as the court of appeals correctly held. App. A, at *5. *See also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945). Petitioners were

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as specific as the Texas rules regarding remedies for briefing deficiencies. *See also* Sup. Ct. Rule 14(4) ("The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny the petition.").

fully capable of presenting this issue to the trial court, notwithstanding their bizarre contentions to the contrary. Pet. at 30. Furthermore, in order to create a constitutional issue, Petitioners ground their claim on the Seventh Amendment. The Seventh Amendment, however, "has not been made binding on the states. . . . " 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2301, at 14 & n.14 (1995), citing *Chicago, Rock Island & Pac. Ry. Co. v. Cole*, 251 U.S. 54, 56 (1919). Thus, even had Petitioners preserved it, their claim would not raise a constitutional question appropriate for certiorari review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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